1.
2205

REPORTS OF CASES

HEARD AND DETERMINED

BY

THE JUDICIAL COMMITTEE,

AND

THE LORDS

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ON

APPEAL FROM THE SUPREME AND SUDDER DEWANNY COURTS

IN

THE EAST INDIES.

BY EDMUND F. MOORE, ESQ.,
BARRISTER AT LAW.

1841-46.

LONDON:
V. & R. STEVENS AND G. S. NORTON,
LAW BOOKSELLERS AND PUBLISHERS,
(SUCCESSORS TO THE LATE J. AND W. T. CLARKE, OF PORTUGAL STREET,)
26, BELL YARD, LINCOLN'S INN;
AND
194, FLEET STREET.

CAL SECRETARIA
LIBRARY.

RICHARD KINDER, PRINTER, GREEN ARBOUR COURT, OLD BAILEY.

LIBRARY

LIST

OF THE

JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON PETITIONS AND APPEALS, TO HER MAJESTY IN COUNCIL.

1841—1846.

The Marquis of *Lansdowne*, Lord President.

The Duke of *Buccleuch*, late Lord President.

The Duke of *Portland*, formerly Lord President.

The Earl of *Harrowby*, formerly Lord President.

Lord *Wharncliffe*, Lord President (since deceased).

Lord *Lyndhurst*, late Lord High Chancellor.

Lord *Cottenham*, Lord High Chancellor.

Lord *Wynford*, formerly Lord Chief Justice of the Common Pleas (since deceased).

Lord *Brougham*, formerly Lord High Chancellor.

Lord *Denman*, Lord Chief Justice of the Queen's Bench.

Lord *Abinger*, Lord Chief Baron of the Exchequer (since deceased).

Lord *Langdale*, Master of the Rolls.

Lord *Campbell*, Chancellor of the Duchy of Lancaster.

Sir *Lancelot Shadwell*, Vice-Chancellor of England.

Sir *Nicholas Conyngham Tindal*, Lord Chief Justice of the Common Pleas (since deceased).

The Right Hon. *Thomas Erskine*, formerly one of the Judges of the Court of Common Pleas.

Sir *James Parke*, Baron of the Exchequer.

Sir *John Bosanquet*, formerly Judge of the Common Pleas (since deceased).

Sir *John Vaughan*, formerly one of the Judges of the Common Pleas (since deceased).

Sir *Herbert Jenner Fust*, Dean of the Arches.

The Right Hon. Dr. *Lushington*, Judge of the High Court of Admiralty of *England*.

Sir *Joseph Littledale*, formerly one of the Judges of the Court of Queen's Bench (since deceased).

Sir *James Lewis Knight Bruce*, Vice-Chancellor.

Sir *James Wigram*, Vice-Chancellor.

The Right Hon. *T. Pemberton Leigh*, Chancellor of the Duchy of Cornwall.

Sir *Frederick Pollock*, Lord Chief Baron of the Exchequer.

Sir *Thomas Wilde*, Lord Chief Justice of the Common Pleas.

PRIVY COUNCILLORS, ASSESSORS.

Sir *Edward Hyde East*, Bart., formerly Chief Justice of Bengal (since deceased).

Sir *Alexander Johnstone*, formerly Chief Justice of Ceylon.

Sir *Edward Ryan*, late Chief Justice of Bengal.

A

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aga Kurboolie Mahomed *v.* The Queen	164
Alloo Paroo, The Queen *v.*	488
Arbuthnot *v.* Norton	435

B.

Baboo Janokey Doss *v.* Bindabun Doss	175
Bengal, The Bank of, *v.* Radakissen Mitter	19
Bindabun Doss, Baboo Janokey Doss *v.*	175
Bombay, The Justices of, Fawcett *v.*	408

C.

Casement *v.* Fulton	395
Chowdry Deby Persad *v.* Chowdry Dowlut Sing	347
Cowas-jee *v.* Thompson	422
Cowie *v.* Remfry	448

D.

Dhurm Das Pandey *v.* Mussumat Shama Soondri Dibiah	229

E.

Eduljee Byramjee, The Queen *v.*	468

F.

Fawcett *v.* The Justices of Bombay	408
Fulton, Casement *v.*	395

J.

Jeswunt Sing-jee Ubby Sing-jee *v.* Jet Sing-jee Ubby Sing-jee	245
Jet Sing-jee Ubby Sing-jee, Jeswunt Sing-jee Ubby Sing-jee *v.*	245
Jewa-jee *v.* Trimbuk-jee	138
Juveer-bhaee *v.* Vuruj-bhaee	324

K.

PAGE
Khajah Hydayut Oollah *v.* Rai Jan Khanum 295
Kanoo-Colanoo Pullia, Namboory Setapaty *v.* 359
Kerakoose *v.* Serle 329
Kirkland *v.* Modee Peston-jee Khoorsed-jee 220

L.

Lal Chutterput Sing, Maha-rajah Ishuree Persad Narain Sing *v.* 100

M.

Maha-rajah Ishuree Persad Narain Sing *v.* Lal Chutterput Sing 100
Maha-rajah Mitterjeet Sing *v.* The heirs of the Ranee Juswunt Sing 42
Maha-rajah Tej Chund *v.* Sri Kanth Ghose 261
Modee Peston-jee Khoorsed-jee, Kirkland *v.* 220
Mussumat Kootby Begum, Sheikh Imdad Ali *v.* 1
Mussumat Shama Soondri Dibiah, Dhurm Das Pandey *v.* . 229

N.

Namboory Setapaty *v.* Kanoo-Colanoo Pullia . , . 359
Norton, Arbuthnot *v.* 435

R.

Radakissen Mitter, The Bank of Bengal *v.* 19
Rai Jan Khanum, Khajah Hidayut Oollah *v.* 295
Rany Anga Moottoo Natchiar, Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver *v.* . . 278
Remfry, Cowie *v.* 448

S.

Serle, Kerakoose *v.* 329
Sheikh Imdad Ali *v.* Mussumat Kootby Begum 1
Sidha Lingayah Charanti, Sri Sunkur Bharti Swami *v.* . . 198
Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver *v.* Rany Anga Moottoo Natchiar . . 278
Sri Kanth Ghose, Maha-rajah Tej Chund *v.* 261
Sri Sunkur Bharti Swami *v.* Sidha Lingayah Charanti . 198
Syud Abbas Ali Khan *v.* Yadeem Ramy Reddy 156

PAGE

T.

The heirs of the Ranee Juswunt Sing, Maha-rajah Mitterjeet Sing *v.* 42
The Queen *v.* Alloo Paroo 488
The Queen, Aga Kurboolie Mahomed *v.* 164
The Queen *v.* Eduljee Byramjee 468
The Mokuddims of Kunkunwaddy *v.* The Enamdar Brahmins of Soorpal 383
Thompson, Cowar-jee *v.* 422
Trimbuk-jee, Jewa-jee *v.* 138

V.

Vuraj-bhaee, Juveer-bhaee *v.* 324

Y.

Yadeem Ramy Reddy, Syud Abbas Ali Khan *v.* 156

APPENDIX.

Order in Council of 11th of *August* 1842, relating to taxation of costs ix
Rule of the Judicial Committee of the Privy Council, directing Judges of the Colonial Courts to give their reasons in writing for the Judgment appealed from xi
Act 6 & 7 *Vict.*, c. 38, to make further Regulations for facilitating the hearing of Appeals and other matters by the Judicial Committee of the Privy Council xiii
Act 7 & 8 *Vict.*, c. 69, for amending the 3 & 4 *Wm.* IV., c. 41, and for extending the jurisdiction and powers of Her Majesty's Privy Council xxi
Act 8 & 9 *Vict.*, c. 30, for amending the 3 & 4 *Wm.* IV., c. 41 xxvii

APPENDIX.

COSTS.

ORDER IN COUNCIL,

Dated the 11th of *August* 1842.

WHEREAS, there was this day read at the Board a representation from the Judicial Committee of the Privy Council, dated the 10th *August* instant; and in the words following:—viz. "The Lords of the Judicial Committee having taken into consideration the scale on which the costs of Appeals, and other matters referred by your Majesty to this Committee, are usually taxed by the Masters of the Court of Queen's Bench, or other persons to whom your Lordships have, from time to time, referred the same; their Lordships agree humbly to represent to your Majesty, that it is expedient that the scale of costs hitherto allowed in the said proceedings before this Committee, should be reduced; and their Lordships recommend that, provisionally, and until further consideration, such costs, in all Appeals, or matters not being Appeals, from the Courts of Ecclesiastical or Admiralty Jurisdiction, should be taxed and allowed by all such taxing officers as shall hereafter be directed to ascertain and report the same to the Board, according to the Schedule hereunto annexed; and that this rate of charges should be observed by Solicitors conducting business before this Committee."

Scale of Costs hitherto allowed, to be reduced according to schedule annexed.

Her Majesty having taken this representation into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of what is therein recommended, and to order, as it is hereby ordered, that the same be duly and punctually observed, complied with, and carried into execution. Whereof all persons whom it may concern are to take notice, and govern themselves accordingly.

SCHEDULE OF FEES ABOVE REFERRED TO.

	£.	s.	d.
Retaining Fee	0	13	4
Perusing Official Copy of Proceedings (This Fee to be raised at the discretion of the Clerk of Appeals.)	2	2	0
Attendances at the Council Office, or elsewhere, on ordinary business, such as to enter an Appeal on an Appearance, to make a Search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0
Instructions for Petition of Appeal	0	10	0
Drawing Petition or Case, per folio	0	2	0
Drawing Appendix, per folio	0	1	0
Copying, per folio	0	0	6
Attendance on Order of Reference		*Nil*	
Drawing small Petitions for Orders, &c.	0	10	0
Instructions for Case	1	0	0
Attending Consultation	1	0	0
Correcting Proof Sheets, per printed sheet	0	10	6
Correcting Foreign or Indian Proof Sheets, per printed sheet	1	1	0
Attending on Setting down for Hearing		*Nil*	
Attending Clerk of Council for Order		*Nil*	
Attending at Council Chamber on a Petition	1	6	8
Attending Council Chamber all day on an Appeal not called on	2	6	8
Attending a Hearing	3	6	8
Attending a Judgment	1	6	8
Sessions Fee (for the legal year) equal to four Term Fees	3	8	0

RULE issued by the Judicial Committee, directing Judges of the Courts in the Colonies and Foreign Settlements of the Crown to give their reasons in writing for the Judgment appealed from; and to transmit the same with the Record.

At the Council Chamber, Whitehall, the 12th of *February* 1845.

By the Judicial Committee of the Privy Council.

Whereas by an Act passed in the Eighth year of Her Majesty's reign, intituled, "An Act for amending an Act passed "in the fourth year of the reign of His late Majesty, enti-"tled, *An Act for the better administration of Justice in His "Majesty's Privy Council,* and to extend its jurisdiction and "powers," it was enacted, "that it should be lawful for the "Judicial Committee of the Privy Council to make any "general rule or regulation to be binding upon all Courts in "the Colonies, and other foreign settlements of the Crown, "requiring the Judge's notes of the evidence taken before "such Court on any cause appealed, and of the reasons "given by the Judges of such Court, or by any of them, for "or against the judgment pronounced by such Court, which "notes of evidence and reasons should by such Court be "transmitted to the Clerk of the Privy Council within one "calendar month next after the leave given by such Court to "prosecute any appeal to Her Majesty in Council, and such "order of the said Committee should be binding upon all "Judges of such Courts in the Colonies or Foreign Settle-"ments of the Crown." Now, THEREFORE, the Lords of the said Judicial Committee of the Privy Council are pleased to order, as it is hereby ordered, that when any Appeal shall be prosecuted from any judgment of any Court in the Colonies or Foreign Settlements of the Crown, the reasons given by the Judges of such Court, or by any of such Judges, for or against such judgment, shall be, by the Judge or Judges

of such Court, communicated in writing to the Registrar of such Court, or other officer, whose duty it is to prepare and certify the transcript record of the proceedings in the cause, and that the same be by him transmitted in original to the Clerk of Her Majesty's Privy Council, at the same time when the documents and proceedings proper to be laid before Her Majesty in Council upon the hearing of the Appeal are transmitted.

Whereof the Judges of all such Courts in the Colonies or Foreign Settlements of the Crown are to take notice, and govern themselves accordingly.

C. C. GREVILLE.

Act 6th & 7th *Vict.*, chap. 38.

An Act to make further Regulations for facilitating the hearing Appeals and other Matters by the Judicial Committee of the Privy Council.—[28*th July* 1843.]

Whereas it has been found expedient to make further Regulations for hearing and making report to Her Majesty in Appeals and other matters referred to the Judicial Committee of the Privy Council, and for the more effectual appointment of surrogates in ecclesiastical and maritime causes of appeal, and for making orders or decrees incidental to such causes of appeal, and for the punishment of contempts, and compelling appearances and enforcement of judgments, orders, and decrees of Her Majesty in Council, or of the said Judicial Committee, or their surrogates in such causes of appeal: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that in any appeal, application for prolongation or confirmation of letters patent, or other matter referred or hereafter to be referred by Her Majesty in Council to the Judicial Committee of the Privy Council, it shall be lawful for Her Majesty, by Order in Council or special direction under Her Royal Sign Manual, having regard to the nature of the said appeal or other matter, and in respect of the same not requiring the presence of more than three members of the said committee, to order that the same be heard, and when so ordered it shall be lawful that the same shall be accordingly heard by not less than three of the members of the said Judicial Committee, subject to such other rules as are applicable, or under this Act may be applicable, to the hearing and making report on Appeals and other matters by four or more of the members of the said Judicial Committee.

Appeals, &c., may be heard, by not less than three members of the Judicial Committee of the Privy Council, under a special order of Her Majesty.

II. And be it enacted, that in respect of all incidents, emergents, dependents, and things adjoined to, arising out of, or connected with Appeals from any Ecclesiastical Court, or from any Admiralty or Vice-Admiralty Court, (save in

Powers of the Judicial Committee and their surrogates in respect to

appeals from Ecclesiastical and Admiralty Courts.

giving a definitive sentence, or any interlocutory decree having the force and effect of a definitive sentence,) the said Judicial Committee and their surrogates shall have full power, subject to such rules, orders, and regulations as shall from time to time be made by the said Judicial Committee, (with the approval of Her Majesty in Council,) to make all such interlocutory orders and decrees, and to administer all such oaths and affirmations, and to do all such things as may be necessary, or the Judges of the Courts below appealed from or their surrogates in the cases appealed, or the Judges of the Courts appealed to or their surrogates, or the Lords Commissioners of Appeals in prize causes or their surrogates, and the Judges delegate or their condelegates under Commissions of Appeal under the Great Seal in ecclesiastical and maritime causes of Appeal, would respectively have had before an Act passed in the third year of the reign of His late Majesty, entituled *An Act for transferring the powers of the High Court of Delegates, both in Ecclesiastical and Maritime causes, to His Majesty in Council*, and another Act passed in the following session of Parliament, entituled *An Act for the better administration of justice in His Majesty's Privy Council*, were passed.

2 & 3 *W.* 4. c. 92.

3 & 4 *W.* 4. c. 41.

Who to be surrogates and examiners of the Judicial Committee in Ecclesiastical and Admiralty Appeals.

III. And be it enacted, that the surrogates and examiners of the Arches Court of *Canterbury* and the High Court of Admiralty of *England*, and such persons as shall from time to time be appointed surrogates or examiners of the said Courts, shall be by virtue of this Act, surrogates and examiners respectively of the Judicial Committee of the Privy Council, in all causes of Appeal from Ecclesiastical Courts, and from any Admiralty or Vice-Admiralty Court.

Past proceedings of surrogates of the Judicial Committee valid, notwithstanding certain informalities.

IV. And be it enacted, that all orders, decrees, and things heretofore done and expedited, in such causes of Appeal, by the surrogates appointed by the said Judicial Committee of the Privy Council, shall be deemed to be valid and effectual, if otherwise lawfully done and expedited, notwithstanding any informality or want of authority in respect to the same, in the orders of His late Majesty in Council of the fourth day of *February* one thousand eight hundred and thirty-three, of the

said Judicial Committee of the fifth day of *February* one thousand eight hundred and thirty-three, of the order of His late Majesty in Council of the ninth day of *December* one thousand eight hundred and thirty-three, of an order of the said Judicial Committee of the tenth day of *December* one thousand eight hundred and thirty-three, and an order of His late Majesty in Council of the twelfth day of *August* one thousand eight hundred and thirty-five.

Manner of conducting Appeals before the Judicial Committee.

V. And be it enacted, that, subject to such rules and regulations as may from time to time be made by the said Judicial Committee with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of his late Majesty or by this Act, the said causes of Appeal to Her Majesty in Council shall be commenced within the same times, and conducted in the same form and manner, and by the same persons and officers, as if Appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty of *England*, or the Lords Commissioners of Appeals in prize causes respectively; and all things otherwise lawfully done and expedited in the said causes of Appeal by the Registrar of the High Court of Admiralty of *England*, his deputy or deputies, in consequence of the passing of the said Acts of the reign of His late Majesty, shall be deemed to be valid to all intents whatsoever.

So much of 2 & 3 *W.* 4. c. 93, as empowers the Judicial Committee and His Majesty in Council to punish contempts, &c., repealed.

VI. And whereas by the provisions of the hereinbefore secondly-recited Act it was enacted, that the said Judicial Committee should have and enjoy in all respects, such and the same power of punishing contempts and of compelling appearances, and that His Majesty in Council should have and enjoy in all respects such and the same powers of enforcing judgments, decrees, and orders, (both *in personam* and *in rem*,) as are given to any Court Ecclesiastical by an Act of Parliament passed in a session of Parliament of the second and third years of the reign of His Majesty King *William* the Fourth, intituled *An Act for enforcing the process upon contempts in the Courts Ecclesiastical of* England *and* Ireland, and that all such powers as are given to Courts Ecclesiastical,

if of punishing contempts or of compelling appearances, should be exercised by the said Judicial Committee, and of enforcing decrees and orders should be exercised by His Majesty in Council, in such and the same manner as the powers in and by such Act of Parliament given, and should be of as much force and effect as if the same had been thereby expressly given to the said Committee or to His Majesty in Council; be it enacted, That so much of the said Act as relates to the powers thereby given to the said Judicial Committee and to His Majesty in Council, under the last-recited act, shall be repealed.

Punishing contempts, compelling appearances, enforcing judgments, &c., in causes of Appeal.

VII. And be it enacted, that for better punishing contempts, compelling appearances, and enforcing judgments of Her Majesty in Council, and all orders and decrees of the said Judicial Committee or their surrogates, in all causes of Appeal from Ecclesiastical Courts and from Admiralty or Vice-Admiralty Courts, Her Majesty in Council and the said Judicial Committee and their surrogates shall have the same powers by attachment and committal of the person to any of Her Majesty's gaols, and subsequent discharge of any person so committed, as by any statute, custom, or usage belong to the Judge of the High Court of Admiralty of *England*: and the said Judicial Committee shall have the same immunities and privileges as are conferred on the Judge of the High Court of Admiralty of *England* under an Act passed in the fourth year of the reign of Her Majesty, intituled *An Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of* England, as fully as if the same had been thereby expressly given to the said Judicial Committee.

3 & 4 *Vict.*, c. 65.

Orders, &c., may be enforced by sequestration against certain persons pronounced contumacious and in contempt.

VIII. And be it enacted, that in all causes of Appeal to Her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts, in which any person duly monished or cited or required to comply with any lawful order or decree of Her Majesty in Council, or of the said Judicial Committee or their surrogates, and neglecting or refusing to pay obedience to such lawful order or decree, or committing any contempt of the process under the Seal of Her Majesty in ecclesiastical and maritime causes, shall

reside out of the dominions of Her Majesty, or shall have privilege of peerage, or shall be a Lord of Parliament or a Member of the House of Commons, it shall be lawful for the said Judicial Committee or their surrogates to pronounce such person to be contumacious and in contempt, and after he shall have been so pronounced contumacious and in contempt to cause process of sequestration to issue under the said Seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same, and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect to such real and personal estate, goods, chattels, and effects sequestrated thereby, as may be necessary, or for payment of monies arising from the same, to the person to whom the same may be due, or into the Registry of the High Court of Admiralty and Appeals, for the benefit of those who may be ultimately entitled thereto.

Inhibitions, &c., to be in Her Majesty's name, and of force throughout the British Dominions.

IX. And be it enacted, that all inhibitions, citations, monitions, and other instruments incidental to or arising out of such causes of Appeal, shall be issued in the name of Her Majesty, and under Seal of Her Majesty in ecclesiastical and maritime causes, and shall be of full authority in all places throughout the dominions of Her Majesty.

Monitions for payments into the Registry of the Admiralty Court under Orders, &c.

X. And be it enacted, that in all Appeals in ecclesiastical and maritime causes to Her Majesty in Council it shall be lawful for her Majesty in Council, and the said Judicial Committee or their surrogates, at the petition of any person interested in the same, to decree monitions for the transmission of any sum or sums of money respecting which any order or decree may be made, or any questions may be depending arising out of such causes, and the proceeds of all ships or vessels, goods, and cargoes, respecting which any Appeals may be depending, into the Registry of the High Court of Admiralty and Appeals, for the benefit of the person

or persons who may be ultimately entitled thereto, or for payment thereof to the person to whom the same may be lawfully due.

All Appeals from Ecclesiastical and Admiralty Courts may be referred to the Judicial Committee by an Order in Council.

XI. And be it enacted, that it shall be lawful for Her Majesty, by order in Council, to direct that all causes of Appeal from Ecclesiastical Courts, and from the Vice-Admiralty Court of the *Cape of Good Hope*, and all Vice-Admiralty Courts to the westward thereof, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals, within twelve calendar months from the giving or pronouncing of any order, decree, or sentence appealed from, and all causes of Appeal from Vice-Admiralty Courts to the eastward of the *Cape of Good Hope*, in which the Appeal and Petition of Reference to Her Majesty shall have been lodged in the Registry of the High Court of Admiralty and Appeals, within eighteen calendar months, from the giving or pronouncing any order, decree, or sentence appealed from, shall be referred to the Judicial Committee of the Privy Council, and the said Judicial Committee and their surrogates shall have full power forthwith to proceed in the said Appeals, and the usual inhibition and citation shall be decreed and issued; and all usual proceedings taken, as if the same had been referred to the said Judicial Committee by a special order of Her Majesty in Council in each cause respectively.

Costs may be awarded by the Judicial Committee, and taxed.

XII. And be it declared and enacted, that as well the costs of defending any decree or sentence appealed from as of prosecuting any Appeal, or in any manner intervening in any cause of Appeal, and the costs on either side, or of any party, in the Court below, and the costs of opposing any matter which shall be referred to the said Judicial Committee, and the costs of all such issues as shall be tried by direction of the said Judicial Committee respecting any such Appeal or matter, shall be paid by such party or parties, person or persons, as the said Judicial Committee shall order, and that such costs shall be taxed as in and by the said Act for the better administration of justice in the Privy Council is directed respecting the costs of prosecuting any Appeal or matter refer-

red by Her Majesty under the authority of the said Act, save the costs arising out of any ecclesiastical or maritime cause of Appeal, which shall be taxed by the Registrar hereinafter named, or his Assistant Registrar.

Appointment of Registrar and Assistant Registrar in ecclesiastical and maritime causes. 3 & 4 *Vict.*, c. 66.

XIII. And be it enacted, that the Registrar of the High Court of Admiralty of *England* for the time being may be appointed by Her Majesty to be Registrar of Her Majesty in ecclesiastical and maritime causes, and shall have power to appoint an Assistant Registrar, as provided by an Act passed in the fourth year of the reign of Her Majesty, intituled *An Act to make provision for the Judge, Registrar, and Marshal of the High Court of Admiralty of* England, and shall during his good behaviour, and while he shall be Registrar of the said High Court of Admiralty, hold his office of Registrar of Her Majesty in ecclesiastical and maritime causes, and shall do all such things, and shall have the same powers and privileges in respect to the same, as belong to his predecessors in the office of Registrar of His Majesty in ecclesiastical and maritime causes.

Custody of records, &c., of the Court of Delegates and Appeals.

XIV. And be it enacted, that all records, muniments, books, papers, wills, and other documents remaining in the Registry of the High Court of Admiralty and Appeals, appertaining to the late High Court of Delegates and Appeals for prizes, shall be and remain in the custody and possession of the said Registrar of Her Majesty in ecclesiastical and maritime causes.

Judicial Committee empowered to make rules, &c., respecting practice and mode of proceeding in Appeals, &c.

XV. And be it enacted, that it shall be lawful for the said Judicial Committee from time to time to make such rules, orders, and regulations respecting the practice and mode of proceeding in all Appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts, and the conduct and duties of the officers and practitioners therein, and to appoint such officer or officers as may be necessary for the execution of processes under the said Seal of Her Majesty, and in respect to all Appeals and other matters referred to them, as to them shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect

Proviso.

until the same shall have been approved by Her Majesty in Council.

Judicial Committee of Privy Council to proceed with causes depending before late High Court of Delegates.

XVI. And whereas, in certain causes which were depending before the late High Court of Delegates, certain decrees or orders were made and interposed, and are not yet fully carried into effect: and whereas, in consequence of the death of the Judges Delegate, or some of them, named in the several commissions under the Great Seal, such decrees or orders cannot be carried into effect; be it enacted, that all such causes of Appeal and complaint which were depending before the High Court of Delegates, and in which any decree, order, or thing, for the reason lastly hereinbefore mentioned, is outstanding and not fully ended and determined, shall be transferred to the Judicial Committee of the Privy Council; and the said Judicial Committee shall take up and proceed with the said causes in the same manner as if the same had been originally causes of Appeal and complaint depending before the said Judicial Committee.

Definition of terms.

XVII. And be it enacted, that in this Act all words denoting a male person shall be taken to include a female also, and all words denoting one person or thing shall be taken to include also several persons or things, unless a contrary sense shall clearly appear from the context; and that the words "Arches Court of *Canterbury*," used in this Act, shall be construed to extend to such Court as shall exercise the jurisdiction of the said Court or be substituted for the same; and that wherever the words "Ecclesiastical Court" have been used in this Act, the same shall be construed to extend to such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court or be substituted for the same; and the words "Ecclesiastical and Maritime Cause of Appeal" shall be construed to extend to causes appealed from Ecclesiastical Courts and such Court as shall exercise the jurisdiction or any part of the jurisdiction exercised by any Ecclesiastical Court, or be substituted for the same.

Act 7 & 8 *Vict.*, chap. 69.

An Act for amending an Act passed in the Fourth Year of the Reign of His late Majesty, intituled An Act for the better Administration of Justice in His Majesty's Privy Council; *and to extend its Jurisdiction and Powers.*—[6th *August* 1844.]

Whereas the Act passed in the fourth year of the reign of His late Majesty, intituled *An Act for the better Administration of Justice in His Majesty's Privy Council,* hath been found beneficial to the due administration of justice: and whereas another Act, passed in the sixth year of the said reign, intituled *An Act to amend the Law touching Letters Patent for Inventions,* hath been also found advantageous to inventors and to the public: and whereas the Judicial Committee acting under the authority of the said Acts hath been found to answer well the purposes for which it was so established by Parliament: but it is found necessary to improve its proceedings in some respects for the better despatch of business, and expedient also to extend its jurisdiction and powers: and whereas by the laws now in force in certain of Her Majesty's Colonies and Possessions abroad no Appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees, and orders of any Courts of Justice, within such Colonies, save only of the Courts of Error or Courts of Appeal within the same, and it is expedient that Her Majesty in Council should be authorised to provide for the admission of Appeals from other Courts of Justice within such Colonies or Possessions: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, that it shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any Appeal or Appeals to Her Majesty in Council from any judgments, sentences, decrees, or orders of any Court of

3 & 4 *W.* 4. c. 41.

5 & 6 *W.* 4. c. 83.

Her Majesty, by Order in Council, may provide for the Admission of an Appeal from any Colony, although

there shall not be a Court of Error or of Appeal in such Colony; and may revoke such Orders.

Justice within any British Colony or Possession abroad, although such Court shall not be a Court of Errors or a Court of Appeal within such colony or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such Appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon: Provided always, that it shall be competent to Her Majesty in Council to revoke, alter and amend any such order or orders as aforesaid, as to Her Majesty in Council shall seem meet: Provided also, that any such order as aforesaid may be either general and extending to all Appeals to be brought from any such Court of Justice as aforesaid, or special and extending only to any Appeal to be brought in any particular case: Provided also, that every such general Order in Council as aforesaid shall be published in the *London Gazette* within one calendar month next after the making thereof: Provided also, that nothing herein contained shall be construed to extend, to take away, or diminish any power now by law vested in Her Majesty for regulating Appeals to Her Majesty in Council from the judgments, sentences, decrees, or orders of any Courts of Justice within any of Her Majesty's Colonies or Possessions abroad.

Orders may be either general or special.

General Orders to be published.

Nothing herein to affect the present powers for regulating Appeals from the Colonies.

On Petition, her Majesty may grant an extension of patent term in certain cases.

II. And whereas it is expedient for the further encouragement of inventions in the useful arts, to enable the time of monopoly in patents to be extended in cases in which it can be satisfactorily shown that the expense of the invention hath been greater than the time now limited by law will suffice to reimburse; be it enacted, that if any person, having obtained a patent for any invention, shall before the expiration thereof present a Petition to Her Majesty in Council, setting forth that he has been unable to obtain a due remuneration for his expense and labour in perfecting such invention, and that an exclusive right of using and vending the same for the further period of seven years, in addition to the term in such patent mentioned, will not suffice for his reimbursement and remuneration, then, if the matter of

such petition shall be by Her Majesty referred to the Judicial Committee of the Privy Council, the said Committee shall proceed to consider the same after the manner and in the usual course of its proceedings touching patents, and if the said Committee shall be of opinion, and shall so report to Her Majesty, that a further period greater than seven years extension of the said patent term ought to be granted to the petitioner, it shall be lawful for Her Majesty, if she shall so think fit, to grant an extension thereof for any time not exceeding fourteen years, in like manner and subject to the same rules as the extension for a term not exceeding seven years is now granted under the powers of the said Act of the sixth year of the reign of his late Majesty.

Her Majesty may grant extension for a lesser term than that prayed.

III. Provided always and be it enacted, that nothing herein contained shall prevent the said Judicial Committee from reporting that an extension for any period not exceeding seven years should be granted, or prevent her Majesty from granting an extension for such lesser term than the petition shall have prayed.

As to extension of term where patentees have assigned their patent rights.

IV. And whereas doubts have arisen touching the power given by the said recited Act of the sixth year of the reign of his late Majesty in cases where the patentees, have wholly or in part assigned their right; be it enacted, that it shall be lawful for Her Majesty, on the report of the Judicial Committee, to grant such extension as is authorized by the said Act and by this Act, either to an assignee or assignees, or to the original patentee or patentees, or to an assignee or assignees and original patentee or patentees conjointly.

Disclaimer and memorandum of alteration under 5 & 6 *W.* 4. c. 83, may be made, notwithstanding original patentee may have assigned his patent right.

V. And be it enacted, that in case the original patentee or patentees hath or have departed with his or their whole or any part of his or their interest by assignment to any other person or persons, it shall be lawful for such patentee, together with such assignee or assignees if part only hath been assigned, and for the assignee or assignees if the whole hath been assigned, to enter a disclaimer and memorandum of alteration under the powers of the said recited Act; and such disclaimer and memorandum of such alteration, having been so entered and filed as in the said recited Act mentioned,

shall be valid and effectual in favour of any person or persons in whom the rights under the said letters patent may then be or thereafter become legally vested; and no objection shall be made in any proceeding whatsoever on the ground that the party making such disclaimer or memorandum of such alteration had not sufficient authority in that behalf.

Disclaimer and memorandum of alteration already made, to be deemed valid.

VI. And be it enacted, that any disclaimer or memorandum of alteration before the passing of this Act, or by virtue of the said recited Act, by such patentee with such assignee or by such assignee as aforesaid, shall be valid and effectual to bind any person or persons in whom the said letters patent might then be or have since become vested; and no objection shall be made in any proceeding whatsoever that the party making such disclaimer or memorandum of alteration had not authority in that behalf.

New letters patent granted, under 5&6 *W.* 4., to assignees before passing of this Act, declared valid.

VII. And be it enacted, that any new letters patent which before the passing of this Act may have been granted, under the provisions of the above-recited Act of the sixth year of the reign of his late Majesty, to an assignee or assignees, shall be as valid and effectual as if the said letters patent had been made after the passing of this Act, and the title of any party to such new letters patent shall not be invalidated by reason of the same having been granted to an assignee or assignees: Provided always, that nothing herein contained shall give any validity or effect to any letters patent heretofore granted to any assignee or assignees where any action or proceeding in *scire facias* or suit in equity shall have been commenced at any time before the passing of this Act, wherein the validity of such letters patent shall have been or may be questioned.

Proviso.

Judicial Committee may appoint Clerk of Privy Council to take proofs in matters referred to them.

VIII. Provided always, and be it enacted, that in the case of any matter or thing being referred to the Judicial Committee, it shall be lawful for the said Committee to appoint one or other of the clerks of the Privy Council to take any formal proofs required to be taken in dealing with the matter or thing so referred, and shall, if they so think fit, proceed upon such clerk's report to them as if such formal proofs had been taken by and before the said Judicial Committee.

IX. And be it enacted, that in case any Petition of Appeal whatever shall be presented, addressed to Her Majesty in Council, and such Petition shall be duly lodged with the clerk of the Privy Council, it shall be lawful for the said Judicial Committee to proceed in hearing and reporting upon such Appeal, without any special Order in Council referring the same to them, provided that Her Majesty in Council shall have, by an Order in Council in the month of *November*, directed that all Appeals shall be referred to the said Judicial Committee on which petitions may be presented to Her Majesty in Council during the twelve months next after the making of such order; and that the said Judicial Committee shall proceed to hear and report upon all such Appeals in like manner as if each such Appeal had been referred to the said Judicial Committee by a special order of Her Majesty in Council: Provided always, that it shall be lawful for Her Majesty in Council at any time to rescind any general order so made; and in case of such order being so rescinded, all Petitions of Appeal shall, in the first instance, be preferred to Her Majesty in Council, and shall not be proceeded with by the said Judicial Committee without a special order of reference.

Judicial Committee may proceed to hearing of Appeals without special order of reference.

Proviso.

X. And be it enacted, that it shall be lawful for the said Judicial Committee to make an order or orders on any Court in any colony or foreign settlement, or foreign dominion of the Crown, requiring the Judge or Judges of such Court to transmit to the clerk of the Privy Council a copy of the notes of evidence in any cause tried before such Court, and of the reasons given by the Judge or Judges for the judgment pronounced in any case brought by appeal or by writ of error before the said Judicial Committee.

Judicial Committee may require notes of evidence taken in the Courts of any Colony, &c., of the Crown.

XI. And be it enacted, that it shall and may be lawful for the said Judicial Committee to make any general rule or regulation, to be binding upon all Courts in the Colonies and other Foreign Settlements of the Crown, requiring the Judges' notes of the evidence taken before such Court on any cause appealed, and of the reasons given by the Judges of such Court, or by any of them, for or against the judgment pronounced by such Court; which notes of evidence and reasons

Judicial Committee may make rules to be binding upon such Courts requiring Judges' notes of evidence, &c.

shall by such Court be transmitted to the clerk of the Privy Council within one calendar month next after the leave given by such Court to prosecute any Appeal to Her Majesty in Council; and such order of the said Committee shall be binding upon all Judges of such Courts in the Colonies or Foreign Settlements of the Crown.

In cases of neglect to comply with Order of Council, persons so neglecting may be punished as for contempt

XII. And be it enacted, that in all causes of Appeal to Her Majesty in Council from Ecclesiastical Courts, and from Admiralty or Vice-Admiralty Courts, which now are or may hereafter be depending, in which any person duly monished, or cited, or requested to comply with any lawful order or decree of Her Majesty in Council, or of the Judicial Committee of the Privy Council or their surrogates, made before or after the passing of this Act, shall neglect or refuse to pay obedience to such lawful order or decree, or shall commit any contempt of the process under the Seal of Her Majesty in ecclesiastical and maritime causes, it shall be lawful for the said Judicial Committee or their surrogates to pronounce such person to be contumacious and in contempt, and, after he or she shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said Seal of Her Majesty against the real and personal estate, goods, chattels, and effects, wheresoever lying within the dominions of Her Majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same and payment of the expenses attending such sequestration, and all proceedings consequent thereon, and to make such further order in respect of or consequent on such sequestration, and in respect to such real and personal estates, goods, chattels, and effects sequestrated thereby, as may be necessary, or for payment of monies arising from the same to the person to whom the same may be due, or into the registry of the High Court of Admiralty and Appeals, for the benefit of those who may be ultimately entitled thereto.

Act may be repealed, &c., this session.

XIII. And be it enacted, that this Act may be repealed or amended during this session of Parliament.

Act 8th & 9th *Vict.*, chap. 30.

An Act to amend an Act passed in the Third and Fourth Years of the Reign of His late Majesty King William the Fourth, intituled An Act for the better Administration of Justice in His Majesty's Privy Council.—[30th *June* 1845.]

Whereas by an Act passed in the Session held in the third and fourth years of the reign of his late Majesty King *William* the Fourth, intituled *An Act for the better administration of Justice in His Majesty's Privy Council*, after reciting that various Appeals to His Majesty in Council from the Courts of *Sudder Dewanny Adawlut* at the several Presidencies of *Calcutta*, *Madras*, and *Bombay*, in the *East Indies*, had been admitted by the said Courts, and the transcripts of the proceedings in Appeal had been from time to time transmitted under the Seal of the said Courts through the East India Company, then called the United Company of Merchants of *England*, trading to the *East Indies*, to the office of His Majesty's said Privy Council, but that the suitors in the causes so appealed had not taken the necessary measures to bring on the same to a hearing, it was enacted that it should be lawful for His Majesty in Council to give such directions to the said company and other persons, for the purpose of bringing to a hearing before the Judicial Committee of the Privy Council the several cases appealed or thereafter to be appealed to His Majesty in Council from the several Courts of *Sudder Dewanny Adawlut* in the *East Indies*, and for appointing agents and counsel for the different parties in such Appeals, and to make such orders for the security and payment of the costs thereof as His said Majesty in Council should think fit, and thereupon such Appeals should be heard and reported on to His Majesty in Council, and should be by His Majesty in Council determined, in the same manner, and the judgments, orders, and decrees of His Majesty in Council thereon, should be of the same force and effect, as if the same had been brought to a hearing by the direction of the parties appealing, in the usual course of proceeding:

3 & 4 *W.* 4., c. 41.

Provided always, that such last-mentioned powers should not extend to any Appeals from the said Courts of *Sudder Dewanny Adawlut* other than Appeals in which no proceedings then had been or should thereafter be taken in *England* on either side for a period of two years subsequent to the admission of the Appeal by such Court of *Sudder Dewanny Adawlut*: And whereas by certain Orders in Council made under certain powers contained in the said Act provision is made for registering in the Council Office the arrival in this country of the transcripts of the proceedings in Appeals from the said Courts: And whereas it is considered advisable that the said Act should be amended in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the hereinbefore recited provisions of the said Act shall not apply to the case of any Appeal which shall be admitted by any of the said Courts of *Sudder Dewanny Adawlut* after the first day of *January* one thousand eight hundred and forty-six.

Recited provisions of 3 & 4 *W.* 4. c. 41, not to apply to Appeals admitted by *Sudder* Courts after 1st *Jan.* 1846.

II. And be it enacted, That any Appeal to be admitted by any of the said Courts of *Sudder Dewanny Adawlut* after the said first day of *January* one thousand eight hundred and forty-six, shall be considered and be held to be abandoned and withdrawn by consent of the parties thereto, unless some proceedings shall be taken in *England* in the same by one or more of the parties thereto within two years after registration at the Council Office of the arrival of the transcript; and any such Appeal as aforesaid shall be held to be abandoned and withdrawn in like manner under any other circumstances which Her Majesty in Council may from time to time by any orders or rules in that behalf direct to be taken and considered as a withdrawal thereof; and the East India Company are hereby required from time to time to ascertain and certify to the proper Courts in the *East Indies*, all Appeals which may from time to time become abandoned and dropped under the provisions of this clause.

Appeals admitted after 1st *Jan.* 1846, to be considered as abandoned by consent, unless, &c.

CASES

IN

THE PRIVY COUNCIL

ON APPEALS FROM

THE EAST INDIES.

CHOWDRY DEBY PERSAD and BENY PERSAD - - - - - } *Appellants*,

AND

CHOWDRY DOWLUT SING - - *Respondent*.*

On Appeal from the Sudder Dewanny Adawlut of Bengal.

11th & 13th Dec. 1844.

The statement in a Deed of Compromise, that the consideration money was paid, is not of itself, according to the practice of the native courts in *India*, conclusive evidence of such payment, and may be rebutted by evidence of non-payment.

Where payment is denied and evidence of non-payment produced, the burthen of proof that the money was paid, lies on the debtor.

THE suit out of which this appeal arose, was instituted by the Respondent, to recover from the Appellants the sum of R. 30,501. 5 a. 4 k., the amount of principal and interest on a sum of S. R. 21,000, stipulated to be paid by the Appellants to the Respondent, in a *rufanama* (deed of compromise), bearing date the 24th of *June* 1835, entered into by the respective

* Present: Members of the *Judicial Committee*,—Lord Langdale, Mr. Baron Parke, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

parties to the original suit, under the following circumstances:—

In the year 1832, the Respondent instituted a suit, against the Appellants, and one *Domun Sing*, for recovery of a *mouza* called *Koolhana*, in *pergunna Ammartoo*, in the Presidency of *Bengal*. In that suit the decision was at first against the Respondent; but he appealed to the *Sudder Dewanny Adawlut* of *Calcutta*, and by a Judgment of that Court, bearing date the 28th of *July* 1834, obtained a Decree for possession. By an Order of the last-mentioned Court, dated the 7th of *November*, in the same year, the Respondent was ordered to be put in possession of the *mouza*, with a direction that the *wasilat*, or mesne profits, principal and interest, of the *mouza*, were to be accounted for, and paid to him, from the date of the suit to the date of possession.

In pursuance of this Order, the Respondent was put in possession, and an *Amin* deputed to take the account of the mesne profits of the *mouza*. No account, however, was taken, in consequence of an arrangement of compromise, having been entered into between the Respondent and the Appellants, and *Mussumat Jhuldi Kooner*, the widow of *Domun Sing*, whereby the Appellants and *Mussumat Jhuldi Kooner* undertook to pay the Respondent R. 30,000 for the mesne profits of the *mouza* in question, from the commencement of the action, up to the date of possession, and R. 52,000 for mesne profits for the period antecedent to the institution of the suit. Of the above sums of R. 30,000 and 52,000, the Appellants were to pay one-half, as their share, which they engaged to discharge in the following manner:—Of R. 26,000, half of the R. 52,000, they undertook to

pay R. 21,000 in cash, and R. 5,000 by instalments; and the whole of the 15,000, half of the R. 30,000, by instalments; the instalments to commence from the beginning of 1243, and end in 1252, *Fusly*, corresponding with 8th *September* 1835, to *September* 1845, A.D.

To effect this arrangement, a *kistbundy*, or instalment-bond, was executed by the Appellants, on the 24th of *June* 1835, and, at the same time, the Respondent executed a *rufanama*, acknowledging the compromise. In both of these instruments, the principal sum of R. 21,000 was mentioned to have been paid.

Some time in the year 1837, the present Appellants presented a petition to the *Zilla* Court, alleging that the Respondent received the R. 21,000, when the deeds were being drawn out, and that he had also received R. 5,600, under the instalment-bond. The Respondent, by a counter-petition, denied the truth of this statement, whereupon the Court, on the 11th of *January* 1837, ordered, that the *kistbundy* should be produced, and the subject of the *rufanama* and receipts be explained within fifteen days; and the attendance of certain persons therein named was directed, to give evidence in verification of the facts stated in the proceedings.

In conformity with this Order, four persons, who alleged themselves to be subscribing witnesses to the deed of *rufanama*, the original writer of the instrument, and the *Kazi*, before whom the deed was executed, were examined by the Court. The actual payment of the sum in question was not, however, proved by any of these witnesses.

On the 31st of *March* 1837, the *Zilla* Court of

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

Bahar made an Order in the cause, which, after giving the Appellants credit for R. 5,100, paid to the Respondent, on account of the R. 15,000, under the *kistbundy*-bond, ordered as follows:—"With regard to the R. 21,000, which is on account of profits for period antecedent to action of Appellant (the present Respondent), no Order can be passed from this Court; but if Appellant, as alleged by him, has not received the money in question, with regard to it, and with regard to the interest on it, he has the option of a regular suit."

The present Appellants were dissatisfied with this Order, and appealed to the *Sudder Dewanny Adawlut* of *Calcutta*, which Court, on the 29th of *June* 1837, ordered, so far as respects the subject-matter of this appeal, that "in the event of Appellant (the present Respondent) not having received the alleged R. 21,000 from Respondents (present Appellants), on account of profits for time anterior to action, with interest, Appellant was at liberty to enter into a regular suit for the same."

In pursuance of the leave thus given, the Respondent, on the 28th of *June* 1838, brought an action in the *Zilla* Court of *Bhagelpoor*, against the Appellants, for the recovery of the above sum of R. 21,000, for principal, and R. 7,595, for interest, making together the sum of R. 28,595.

By an Order of the *Zilla* Court of the same date, the cause was transferred for adjudication, to the Court of the Principal *Sudder Amin*, of the *Zilla Bhagelpoor*.

On the 19th of *February* 1839, the Appellants filed their answer to the above plaint, traversing the claim of the Plaintiff, and contending that the R. 21,000 had

been paid to the Plaintiff, upon the execution of the deeds of *kistbundy* and *rufanama*.

Both parties entered into evidence before the *Sudder Amin*. On the part of the Plaintiff (the present Respondent) the proceedings in the *Zilla* Court of *Bahar* of the 31st of *March* 1837, and of the *Sudder* Court on appeal of the 29th of *June* 1837, before referred to, were produced, together with the *kistbundy* and *rufanama*, and the depositions of *Ghunsam Lal*, the writer of the deed of *rufanama*, and *Dhoorup Sing* and *Miter Sing*, two of the subscribing witnesses to the deed. The evidence of these witnesses proved that the R. 21,000 were not paid at the time of the deeds being prepared or executed; that at the time of the preparation of the deeds, it was intended that, upon payment of the R. 21,000, a formal receipt should be given; and that, at some months after the execution of the deeds, the money was spoken of, as being still due and unpaid.

The Defendants (the present Appellants), on their part, filed the depositions of the *Kazi*, before whom the *rufanama* had been executed, and of two of the witnesses to the *rufanama*; but no evidence was given to prove the fact of payment, nor was any receipt for the money produced; and it appeared that when R. 4,000 and R. 1,600, in respect of the instalments were paid, these sums were counted out in the presence of witnesses, and formal receipts taken.

On the 29th of *April* 1839, the Principal *Sudder Amin* made his decree, and thereby ordered, that the Defendants pay to the Plaintiff the sum of R. 30,501. 5 a. 4 k., the amount of claim, and R. 1,384. 12 a., costs—altogether R. 31, 886. 1 a. 4 k.; and that Plaintiff should receive interest on the amount of claim,

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

from the date of the decree up to the date of receipt, at the rate of one per cent., and costs.

Against this decision, the Defendants appealed to the *Sudder Dewanny Adawlut* of *Bengal*; and, on the 30th of *July* 1839, filed their grounds of appeal, complaining of the decree, and contending that it was contrary to evidence.

The hearing of the appeal took place before *C. Tucker*, Esq., one of the Judges of the *Sudder* Court, on the 4th of *January* 1840, when judgment was delivered by him, in the following terms:—"In my opinion, the judgment of the *Sudder Amin*, in the absence of proof to support the allegation of the Defendants, appears extremely just and proper, because the parties make no objection to the documents, only the Plaintiff denies the receipt of the money mentioned in them, and for the refutation of which denial, Defendants rest upon the bare circumstance, that Plaintiff had, in the documents in question, acknowledged the receipt of the money by him,—an argument scarcely beneficial to them in this case, as it is an understood thing that after documents are drawn out, money mentioned in them is paid, and, therefore, mention of the receipt of money is made in the document; but the onus of proof as to the actual payment of the money mentioned in the documents, and its receipt by Plaintiff, must rest altogether with Defendants. The evidence, however, produced by them, does by no means establish a single iota of the fact, and although *Ahmud Ali*, *Kazi*, and *Hyder Ali*, and *Kishnee Rae*, have declared to the fact of the *Kazi's* seal being impressed on the *rufanama* and *kistbundy*-deeds, on the acknowledgment by Respondent of the receipt of R. 21,000 by him, yet this circumstance does not prove

the actual receipt of the money, because Defendants, in their petition in *Zilla Bahar*, stated that the money had been paid at the time the documents were being drawn out; and the evidence of the *Kazi* and other witnesses (in whose presence the documents in question were being drawn out at the *Kazi's* court) shows that the money had not been received in their presence; and the statement of the Defendants (as found in their rejoinder), of the payment of the money by them in the village of *Sondhi*, while the drafts were being drawn out, is contradicted by their petition. The evidence of *Ghunsam Lal*, the transcriber of the draft and the fair copy of the documents, and of other witnesses, in regard to a promise being made, that the money would be paid after the deeds were drawn and executed, confute the Defendant's statement. Nor can the Plaintiff, who denies the receipt of the money, be required to prove a denial, because default of proof of payment on the part of Defendants is evidence sufficient for the establishment of Plaintiff's claim. In their defence throughout, in this case, the documents of Defendants go but indirectly and evasively to deny Plaintiff's allegation; and in no instance is there a direct admission of actual payment of the money." It was, therefore, ordered that the appeal be dismissed, and the *Zilla* decision affirmed.

The Appellants, after having filed a petition for a review of judgment, which was rejected, brought the present Appeal.

Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants; and

Mr. *Wigram*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondent.

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

Mr. Baron PARKE:

Their Lordships are of opinion, that in this case they ought to advise Her Majesty to affirm the Decree of the *Sudder* Court. There is no doubt that the deed of *rufanama*, which was executed between the parties, affords evidence, as to the only fact which we have to dispose of upon the present case, namely, whether the R. 21,000, which were stipulated as the sum to be paid down, upon executing the deeds of compromise, were paid or not. There is no doubt that the *rufanama*, which contains a statement of the fact, that the R. 21,000 were paid, is evidence. It is admitted on both sides, that it was not conclusive evidence, as the statement of such a fact in a deed under the seal would be in a Court of law in *England*; but it is evidence as far as it goes.

Then let us see whether that evidence, which is *primâ facie* proof of the payment, is or is not rebutted by all the circumstances of the case.

We think, that looking at the mode in which this case has been treated by the Judge of the *Sudder Dewanny Adawlut* (who must be supposed to be well informed of the law and the practice in *India* in such cases); the statement of such a fact in a deed of this description, is *primâ facie* evidence, that the money therein stated to be paid, was paid at the time of the execution of the deed. But he says "that it is an understood thing that after documents are drawn out, money mentioned in them is paid, and, therefore, mention of the receipt of money is made in the documents."

Now that being so, the inference that would be derived from the statement of such a fact in the deed is, that the *rufanama* must *primâ facie* be considered as evidence, that there was at the time that the deed

was executed, and as part of the same transaction, a payment of money. But that evidence is completely rebutted by all the parol evidence in the case, and by the admission of the parties, because all the witnesses present at the time of the transaction of the execution of the *rufanama*, either are silent as to the fact of the payment, or they expressly depose that no payment took place at the time.

The Appellants themselves admit in the proceedings, that such was the fact, for they have stated in their answer to the plaint in the *Zilla* Court, that the money was received, without stating at what time—not stating that it was received at the time the deed was executed. In the rejoinder they make a different statement, and say that the money was paid antecedently to the execution of the deed, namely, while the draft of the deed was being prepared. In the petition to the *Sudder* Court, they state that the money was paid at the time that the deeds themselves were prepared. Thus varying in the statement of the time and place of the payment of the money, but not stating in any of them, that the money was paid at the time the deed was executed.

Therefore, the question now is this: the *primâ facie* inference arising from the statement in the deed being rebutted, how stands the evidence with regard to the fact of the payment? The witnesses who depose to the execution of the *rufanama*, state that the Plaintiff upon that occasion admitted that he had received the money at an antecedent time. Now is that fact proved? If that fact had been proved, that the money had been paid at an antecedent time, not immediately at the time of the execution of the deed, but whilst the deed was being prepared, is it probable that such a sum as

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

that would have passed from the one party to the other, without some receipt being given?

Then it is afterwards alleged by the Appellants, that the payment took place in the presence of respectable witnesses. Now those witnesses were not called in the *Zilla* Court, nor is any mention made of them in the Petition of Appeal; but in the Petition of Review it is stated as a fact, that the Defendants had offered to bring forward those respectable witnesses before whom he said the payment took place, and that the Judge of the inferior Court, the *Amin*, had refused to receive them. Now it is impossible for their Lordships to believe that such could have been the case; because it appears, that the proceedings before the *Amin* are conducted with regularity, according to the Regulations prescribed by the East India Company. Amongst these Regulations, it is ordered, that every document should be on the file of the Court, and if there had been any petition to examine those witnesses, there is no doubt that there would have appeared upon the files of the *Zilla* Court, some *durkhast* or petition, for the examination of those witnesses. Therefore, it is impossible, that their Lordships can believe that any such application had been made to the *Amin*. Then there is an admission by the Defendants, that there were those respectable witnesses who might have been brought forward; and the circumstance of their not bringing them forward is exceedingly strong, that no such fact took place, as that there had been, antecedent to the *rufanama*, the payment of this sum of money.

Besides all this, it is insisted that there are some circumstances, from which it is to be inferred that this payment took place, because it is said, in the first place, that at the time when the instalments, stipulated

for in the Deed of Compromise, were paid, no mention was made of the fact of the large sum of R. 21,000 not having been paid. Now that is a fact, certainly, which at one time weighed with their Lordships, and which it appeared desirable to have explained; and explanation is given of the fact by the evidence of *Ghunsam Lal*. *Ghunsam Lal* is a person to whom both the Judge of the inferior Court and the Judge of the *Sudder Dewanny* Court give credit; both of them have stated that they acted upon his evidence, and, therefore, they must have formed an opinion that his evidence was worthy of belief. And they are much more competent to form an opinion than we are. This witness says, that at the time the payment was made, this conversation took place between the Appellants and the Respondent:—"What do you say now about the payment of the R. 21,000, in cash, mentioned in the document?" The Appellants, in answer, said, "It is difficult to pay at once R. 21,000. We shall arrange for it, and when the money is paid we shall take a receipt." Therefore, it is clear that at that time there was mention made of the non-payment of the large sum of R. 21,000. The *Kazi*, indeed, as the Appellants' counsel has observed, when he is interrogated as to the same conversation, says that none such took place. But in estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained, by supposing that his attention was not drawn to the conversation at the time.

Another circumstance which also had weight with their Lordships at one time, is the delay in the institution of the suit. That circumstance is no doubt

1844.

CHOWDRY DEBY PERSAD v. CHOWDRY DOWLUT SING.

deserving of consideration. It may have been that the Respondent was prevented from instituting the suit sooner, by delusive and evasive promises made from time to time. The mere circumstances of the delay in the suit, is a circumstance of some weight, but not of any great weight, when we look at the other facts of the case.

Their Lordships are of opinion, that the burden of proof, which lay upon the Appellants, of showing the payment of the money, has not been discharged. They have given some *primâ facie* evidence of the payment, but that has been rebutted by the other evidence in the case, and by the consideration, that if it had been true, there were witnesses who could have placed the fact beyond dispute had they been called. It is not likely that the payment of so large a sum, which would require, according to the habits of the natives in *India*, a considerable time to effect, could have taken place, without some persons being present, who could have proved the facts. Upon the whole, their Lordships are of opinion, that the Judgment of the *Sudder* Court, and also the Judgment of the *Amin*, are perfectly right; and, therefore, that the Decree ought to be affirmed, with costs.

NAMBOORY SETAPATY and others - *Appellants*,

AND

KANOO-COLANOO PULLIA and others *Respondents*.*

On Appeal from the Sudder Dewanny Adawlut at Madras.

7th & 8th Feb. 1845.

Suit by certain *Comaties* of the *Vaisyas*, or third caste of the Hindoos, against the *Mantrimaha-nad* (secret assembly, for avenging encroachments upon rules or rights of caste), to establish their right to have performed for them and their tribe, certain religious ceremonies, called *soobha* and *asoobha* (auspicious and inauspicious), by *Brahmins*, in the language of the *Vedas*, in the enjoyment of which they had been disturbed by the *Brahmins* refusing to perform such ceremonies. In the answer to the plaint, the Defendants denied the right of the *Comaties*, and set forth certain acts, whereby they had forfeited their right to have the ceremonies performed for them, by the *Brahmins*. The *Zilla* Court, taking that part of the Defendants' answer which set forth the acts by which the forfeiture of the rights in question was occasioned, framed it into a statement of facts and law, for the opinion of the *Pundit* of the Court; and upon his opinion, declared the Plaintiffs' tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon Appeal, the Provincial Court remitted the suit to the *Zilla* Court, to take evidence, and upon such evidence, and the opinions of the *Pundits*, which the Provincial Court took upon the same statement as the *Zilla*, they affirmed the Decree. The *Sudder Dewanny Adawlut*, upon the whole case, reversed these decisions. Held by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular, and contrary to the express provisions of the *Madras* Regulation XV. of 1816, sec. x., cl. 3 & 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit.

Quære. Whether the Civil Courts in *India* have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right, to perform or have performed, any religious ceremonies.

THE question involved in this Appeal respected the rights of the castes of the *Brahmins* and *Vaisyas*, and

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

arose out of a claim preferred by the Appellants, as the representatives of the *Comaties*, a tribe of merchants and traders residing at *Masulipatam*, in the Presidency of *Madras*, to have the whole of certain religious rights and ceremonies, called *soobha* and *asoobha* (auspicious and inauspicious), performed for themselves and their families, in their houses, by *Brahmins*, in the language of the sacred writings, the *Sastras* and the *Vedas*.

The Respondents (who were members of the *Mantrimaha-nad*, or secret assembly for avenging encroachments on the rites and rules of caste) asserted that the *Comaties*, and the whole Merchant class, having for many ages neglected to observe some of the ceremonies prescribed for their caste, and in their stead adopted other and spurious ceremonies, in conformity with rites prescribed in the *Puranas*(*a*) and other works, had become degenerate, and had so absolutely forfeited the privilege they once possessed, that no expiation could restore them to their former rights.

Disputes having for a long time existed between the *Brahmins* and the *Comaties*, concerning the performance of these ceremonies, and disturbances constantly taking place on their performance, or the attempt to perform them, the magistrate of the city of *Masulipatam*, in order to bring the question at issue before a tribunal competent to determine the right, issued an Order, prohibiting the *Comaties* from the performance of one of the ceremonies in question, in the language of, or according to, the *Vedas*, until they had established their right to do so in a Civil Court.

In consequence of this Order, the Appellants, *Ma-*

(*a*) The sacred heroic poems of the *Hindoos*, considered next in authority to the *Vedas*.

medy Linghia, Chittoory Veria, and *Namboory Vencata Das*, who were the leading men of the Merchant caste, filed a plaint in the *Zilla* Court of *Masulipatam*, against *Kanoo-Colanoo Ramia, Kanoo-Colanoo Nagana*, and *Caza Condavathoriloo*, the Respondents, as members of the *Mantri-maha-nad*.

The plaint stated, that on the 20th of *June* 1817, impediment was made against the Plaintiffs attending to the rites prescribed by the *Vedas*; and they sued for Rs. 600, viz. Rs. 200 as loss and 400 as damages, and prayed for permission to perform, in conformity to the *Vedas* and the *Sastras*, the rites and ceremonies of their caste, viz. *upanayana* (or investiture of the sacerdotal thread), marriage, and other *soobha* and *asoobha* ceremonies, and expressly stated that they (the Plaintiffs) all agreed to conform to the special rules laid down in the *Hindoo Dharma Sastras*, which had been approved of and acted on by the Government.

The Defendants, by their answer, denied the right of the *Comaties* to perform, and the fact of their ever having performed, the ceremonies appointed by the *Vedas*; they admitted the intervention of the magistrate, and stated that "upwards of two thousand years ago, the *Comaties* (Merchant caste) adopted the customs of the *Soodra* caste, and some of them became '*Byri Comaties*,' and '*Bookka*,' caste people, &c.; the rest of them, amounting to one hundred and two '*gotrums*' (families or tribes), fabricated false *gotrums* for themselves, and called themselves *Nagaram Comaties*. They fabricated a book called '*Canniaca Puranam*,' named the *Bhashcara Puntooloo-varoo* their priest, conformed to that book, performed the sign of the *upanayana* ceremony in a loose manner, and in the language of the *Puranas*; at the time of marriage,

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

made marriage ceremony in seven days, contrary to the custom of all castes whatever, erected '*prolu*' posts, made (*nepasani moodaloo*) lumps of dough with flour, and got the same divided among them according to their spurious '*gotrums*,' at midnight fetched the pot of water called '*arivany*,' and observed the ceremonies for ten days on the occurrence of a birth, and fifteen days on the occurrence of a death. In this manner the forefathers of the Plaintiffs, the other merchants, and the Plaintiffs themselves, had got all ceremonies conducted for upwards of two thousand years past." They stated instances in which the Plaintiffs, or some of them, had failed in previous attempts to sustain the right now claimed, and objected to the form of the plaint as not sufficiently setting forth the particulars and nature of the obstruction, for which the Plaintiffs sought for compensation, in accordance with section iii., Reg. III. of 1802.

The Plaintiffs filed their reply, in which they insisted generally on their right to the performance of the ceremonies in question, but without negativing or rebutting the specific statements contained in the answer. To this the Defendants rejoined.

Before the filing of the replication, the following question was propounded to the *Pundit* of the *Zilla* Court :—

"Would it be lawful for the *Brahmins* to administer all the rites, consisting of the *soobha* and *asoobha* ceremonies to the third caste, viz. *Vaisyas*, in the language of *Vedas*, as prescribed by the *Dharma Sastras*?"

The *Pundit's* answer to this question was as follows:—"As the *soobha* and *asoobha* ceremonies for the third caste, viz. *Vaisyas*, are conformably to the

Dharma Sastras laid down in the *Vedas* and *Smritis*, *Brahmins* may regularly administer them all."

The points at issue not being clearly ascertained from the pleadings, the parties were questioned in open Court, in conformity with cl. 2, s. x., of Reg. XV., 1816, as to the precise object of the action, and the grounds on which it was maintained; when the Plaintiffs stated, that their object was, the establishment of their right to have the whole of the *soobha* and *asoobha* rites and ceremonies performed in their houses by *Brahmins*, in the language of the *Vedas*, and that they claimed this right on the ground of the *Sastras*.

Whereupon the *Zilla* Judge submitted the following case and questions to the Hindoo law-officer of the Court:—

"A dispute arose in a certain city between the men of the *Brahmin* caste, and those of the Merchant caste. The Merchant caste claimed the right of having the *soobha* and *asoobha* ceremonies performed for themselves and families, in the language of the *Vedas*. The *Brahmins* admitted that the Merchant caste originally held the right in question, but contended, that they had forfeited it, for the reasons stated in the paragraph of their answer to the complaint of the Merchant caste" (already stated (*a*),); and required his opinion on the following points:—

"First. Whether any, and if any, which, of the above acts of commission were expressly forbidden by the *Vedas*?

"Second. Supposing any of the above acts to be expressly forbidden by the *Vedas*, and supposing a man of the present generation had committed that act, does it necessarily follow, according to the *Vedas*, that

(*a*) *Ante*, 361.

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

the young son of that man forfeited his right to have the *upanayana* ceremony performed, in the language of the *Vedas*, at the proper age?

"Third. In the same double supposition, does the man himself forfeit his right to have the *soobha* and *asoobha* rites and ceremonies performed for him, in the language of the *Vedas*?

"Fourth. Supposing any of the above acts to be forbidden by the *Vedas*, and that the man who commits it, as well as his son, thereby forfeited their right to have the *soobha* and *asoobha* ceremonies performed for them, in the language of the *Vedas*, does it follow, according to the *Vedas*, that that man and his son have totally forfeited their right, and never can redeem it by any kind of penance or expiation?

"Fifth. If the right be redeemable, what is the requisite penance or expiation?

"Sixth. Supposing the family of a man of the Merchant caste has not, for several generations past, had the *soobha* and *asoobha* ceremonies performed in the language of the *Vedas*, have that family, according to the *Vedas*, forfeited the right altogether, or would it be lawful for a *Brahmin* to perform such ceremonies in the language of the *Vedas* for that family, upon the father of it, in the present generation, doing the requisite penance or making the requisite expiation?"

The *Pundit* returned the following answer to these questions:—

"From the matter contained in these paragraphs, the query of the Court appears to be, whether any act is expressly forbidden by the *Vedas*.

"Nothing herein contained is expressly prohibited by the *Vedas* and *Sastras*. The question of the Court

implies that the Merchant caste, i. e. *Vaisya*, who subsist by trade, have for upwards of two thousand years not performed the *upanayana* ceremony as prescribed by the *Vedas*, and that only the sign was performed.

"From this I am led to think, that without performing the several rites prescribed by the *Vedas*, the *upanayana* ceremony alone was performed.

"No penance is prescribed by the *Sastras* for persons who have been performing *upanayana*, from generation to generation, except in the case of persons having the right to *upanayana* and other ceremonies, who have for a considerable time ceased the observance of them. If a young man of the present generation, or any other person, should state that he is completely degenerated, by the non-performance of the *upanayana* and other ceremonies, and express a desire to be regularly purified, the expiation shall be appointed by not less than three *Brahmins*; a greater number is not forbidden by the *Sastras*, consequently *Brahmins* may appoint such expiation as they shall deem fit. *Upanayana* and other ceremonies are expressly prescribed by the *Dharma Sastras* to be performed in the language of the *Vedas*. I am, therefore, of opinion that *Brahmins* may lawfully perform them.

"The Court have put the query to know what is the expiation. I have not stated it now, as it is impossible to know what may be appointed according to the best judgment of pious *Brahmins*."

The Court being dissatisfied with this answer, referred the case to the *Pundit* for re-consideration, who returned the following further answers :—

To the first question he answered, "Not one of the above acts is forbidden by the *Vedas*."

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

Second. "Those acts not being expressly prohibited by the *Vedas*, it follows that no ancient right can be forfeited by the performance of them."

Third. "The man himself does not forfeit any right, and for the reasons stated in the foregoing answer."

Fourth. "I am of opinion that even if a man's family, from generation to generation, have committed acts forbidden by the *Vedas*, yet may he have the ceremonies performed regularly, through the means of the expiation prescribed by the *Dharma Sastra*."

Fifth. "If a right be utterly forfeited, as in the case of a family having for generations been joined to another caste, there is no expiation. With respect to the Merchant caste people in this instance, it appears from the above case that they have the right of *upanayana* and other ceremonies; and, therefore, it does not appear that any expiation is required by the *Dharma Sastra*."

Sixth. "The *soobha* and *asoobha* ceremonies, consisting of *garbha-dhana*, and *upanayana*, &c., is prescribed by the *Vedas* and *Sastras*, and, therefore, the *Brahmins* may perform the *upanayana* and other ceremonies regularly in the language of the *Vedas* for the Merchant caste."

On the subsequent day, the *Pundit* presented the following additional answer to the sixth question propounded by the *Zilla* Judge:—

"In the queries put by the Court regarding the dispute between the men of the *Brahmin* caste and those of the Merchant caste, my answer then given to the sixth question was too brief; I, therefore, now write explicitly.

"Even if a family of the Merchant caste had for many generations ceased to observe the *soobha* and *asoobha* ceremonies, prescribed by the *Vedas*, the members of that family (in the present generation) would not have utterly forfeited their right to resume the observance of those ceremonies.

"If a member of that family in the present generation should be desirous of resuming his ancient rights, it is laid down in the law, that upon his being purified by a *Brahmin*, the *soobha* and *asoobha* ceremonies, prescribed by the *Vedas*, may be performed for him.

"It appears from the above case, that the Merchant caste have been performing *upanayana* from generation to generation; and, therefore, I am of opinion that, according to the *Vedas* and *Sastras*, *Brahmins* may lawfully perform the *soobha* and *asoobha* ceremonies for the Merchant caste without purification being at all necessary."

Evidence was tendered on both sides, but the Court was of opinion, that it was unnecessary, as "no distinct act of injury having been alleged to have been committed by the Defendants, the Plaintiffs could not be permitted to produce evidence that they had sustained injury; and with respect to the facts alleged by the Defendants, it has so happened that every object has been attained at once by assuming them to be proved."

On the 27th of *June* 1818, the Court pronounced its Decree, whereby it was declared, that the people of the *Comaties* caste might lawfully have the *soobha* and *asoobha* ceremonies performed in their houses, and in the language of the *Vedas*, by *Brahmins*, and that whosoever should hereafter interrupt, or attempt to

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

interrupt, the performance of any of those ceremonies; in the manner aforesaid, would be liable to be proceeded against, for resisting a Decree of Court; and he directed each party to bear their own costs.

From this Decree, the Defendants appealed to the Provincial Court for the Northern Division of *Madras*, complaining that the *Zilla* Judge had passed it against them, without examination of the evidence tendered to prove the customs practised by the *Comaties*, and also alleging, that as the opinion of the Hindoo law-officer was only partly in favour of the *Comaties*, the *Zilla* Judge should, conformably to cl. 1, sec. xvi., Reg. III., 1802, have referred it for confirmation, to the Hindoo law-officers of the higher Courts; and they prayed, therefore, that the Court would, agreeably to sec. xviii., Reg. IV. of 1802, permit them to file their documents, and hear their witnesses, and to reverse the Decree.

Pending the appeal, *Kanoo-Colanoo Nagamu*, one of the original Defendants, died, leaving the Respondent, *Kanoo-Colanoo Chandrapa*, his son and heir, a minor, who was admitted to prosecute the appeal; and about the same time, the Defendants, *Caza Condavathoriloo Yazooloo* and *Kanoo-Colanoo Ramia*, died, leaving *Caza Nagheswara Somayazooloo* and *Kanoo-Colanoo Pullia*, their respective heirs, surviving, who were also admitted to prosecute the appeal.

On the 27th of *May*, the Provincial Court ordered the record to be returned to the *Zilla* Judge of *Masulipatam*, with precept, requiring him to receive the documents, and examine the witnesses, and retransmit the record, with the evidence so taken, to the Provincial Court.

In pursuance of the above Order, Mr. *H. Vibart*,

who was then the Judge of the *Zilla* Court, proceeded to take the documentary and oral evidence, tendered on the part of the Plaintiffs and Defendants. For the Plaintiffs, certain documents were tendered, purporting to come from the chief priest, and from an assembly of learned men, to one *Raya Naikooloo*, and from an assembly of learned men at *Guntoor* to a like assembly at *Masulipatam*, and a mandate from the chief priest to one *Mamedy Venkia*; setting forth and alleging the right of the *Vaisya*, or third class, to the performance of the *upanayana* according to the *Vedas*, and commanding the performance of that ceremony in accordance with the *Vedas*. They also produced twelve witnesses: one a *Purohita* or family priest, and a person employed in the priestly office, a *Pundit*, a shopkeeper, a servant, an *agrahamdar*, (or inhabitant of a village held in proprietary right by a *Brahmin*,) and six persons professing the trade of begging, and obtaining their subsistence from *maniams* (honorary gifts) or alms. These witnesses were called chiefly to prove the right of the Plaintiff's *gotrum*, or tribe, to exercise the privileges of the *Vaisya* class, and to perform and to have performed the *upanayana* and the *soobha* and *asoobha* ceremonies.

The Defendants produced documentary proofs, consisting of the proceedings of their caste, concerning the improper performances of the ceremonies by the Plaintiff's *gotrum*, and the means taken to prevent their profanation. They also produced various letters to prove that the mode of address adopted by the Plaintiffs was inconsistent with their being on an equality with the people of the Defendants' caste: and they examined twenty-four witnesses, including priests, *Pundits*, *Gomashtas*, heads of the assembly

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

and of the Defendants' caste, tradesmen, mechanics, and persons obtaining their subsistence from *maniams*; all of whom deposed to the nature of the customs observed by the Plaintiffs, at their marriages, being in accordance with those described by the Defendants in their answer; that the Plaintiffs were of a *gotrum* or tribe distinct from the Defendants, having degenerated from their caste, and that they were not entitled to perform, nor were they in the habit of performing, the ceremony of *upanayana*, or the *soobha* and *asoobha* ceremonies in the language of, or according to, the *Vedas* and *Sastras*.

The evidence thus taken was transmitted by the *Zilla* Court to the Provincial Court of the Northern Division, and, having been read, a motion was made on the part of the Defendants, to refer the questions at issue for the opinion of the *Pundit* of the Provincial Courts.

On the 24th of *August* 1827, the First Judge of the Provincial Court for the Northern Division delivered in the following draft minute of Decree:—The object of litigation in this cause being of considerable importance, as involving the rights of caste of the *Brahmins* and *Banians*, I am of opinion that it will be of advantage, that the Provincial Court, previously to coming to a decision upon the merits of the cause, should have before them the correctest information as to the bearings of the Hindoo law upon the question at issue, and for that purpose, that the motion of the Appellants, praying that the questions proposed for the opinion of the *Pundit* of the *Zilla* Court, in this cause, should be submitted to the *Pundits* of the several Provincial Courts, should be complied with.

The Third Judge was precluded from giving an opi-

nion in the Provincial Court, inasmuch as the original Decree had been passed by him when *Zilla* Judge, and there being a difference of opinion between the First and Additional Judge on the subject of proposing the questions to the *Pundits* of the several Provincial Courts, it was ordered, agreeably to sec. ii., Regulation XV. of 1802, that the opinion of the First Judge be admitted, and the questions be transmitted to the Registrars of the several Provincial Courts.

To the questions so transmitted, the following answers were obtained from the *Pundits* of the four Provincial Courts :—

First Question. "Can the *Brahmins* properly perform all the *soobha* and *asoobha* ceremonies for the third or *Vaisya* caste with the *Veda mantras*, according to the *Dharma Sastra*?"

First Answer. "As it is authorised in the *Dharma Sastra* that all the *soobha* and *asoobha* ceremonies may be performed for the third or the *Vaisya* caste, according to the *Veda*, the *Brahmins* may perform the ceremonies according to the *Veda* for the *Vaisyas*, who have had no interruption in the performance of the ceremonies of the *Vedas*."

(The further statement of the nature of the dispute, and the queries submitted to the *Pundits* of the Provincial Courts were the same as those already put to the *Pundit* of the *Zilla* Court (*a*).)

Vankamamedy Narraina Sastrooloo, the Northern Provincial Court's *Pundit*, returned the following answer :—

First. "The ceremonies mentioned in the case, viz., *prolustumbaloo*, or posts, *napasani moodaloo*, or lumps

(*a*) *Ante*, 363.

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

of dough, *arivany*, or sacred water, &c., not being prescribed by the *Vedas* to be performed on the occasion of marriage, the said ceremonies are not consistent with the *Vedas*."

Second and Third. "The man of the present generation having, by performing the marriage and *upanayana* with the observance of the foregoing ceremonies, which are contrary to the *Vedas*, forfeited his right, his young son can have no right to perform the *upanayana* newly according to the rule contained in the *Vedas*."

Fourth. "If a man whose ancestors had from the beginning observed the ceremonies of *upanayana*, &c., prescribed by the *Veda*, had not had the ceremony of *upanayana* performed for himself at the proper age, and wished to perform it at a subsequent period, he should perform the penance called the *vratea stomum*, and perform the *upanayana* according to the *Veda*: thus it is stated in the work by *Vignyaneswara*:—

"The *Dharma Punnaloo* prescribes penance for a man whose grandfather and father did not perform the *upanayana*, but penance is not granted to those whose ancestors beyond the grandfather, did not perform the *soobha* and *asoobha* ceremonies; but as the present man, who has not had the ceremonies prescribed by the *Veda* from the time of his ancestors, and his son, relinquishing the *rishi gotrums* (*a*), follow the invented *gotrums*, and perform the ceremonies prescribed for the observance of the *Vuneda* caste people, according to the *Canniaca Puranam*, they are not entitled to any of the two descriptions of penance mentioned above, and consequently have totally lost the right of performing

(*a*) A *gotrum* or family which bears the name of *Rishi* (a saint or holy personage), from whom the descents is traced.

the ceremonies in the language of the *Vedas*, and they cannot redeem it by any kind of penance.

"*Yagnyawalkya* in *Vignyaneswara*. The *Brahmins* ought to perform the ceremony of *upanayana* within the age of sixteen years, the *Cshatriyas* within the age of twenty-two years, and the *Vaisyas* within twenty-four years; should they exceed the above period respectively, he forfeits the *Brahminical* thread, and the right to perform the ceremonies in the language of the *Vedas*; if he performs the penance called the *vratea stomum*, he will obtain the right of performing the ceremony. *Dharma Prashna* says, that the man whose father and grandfather have not the *upanayana*, is equal to the murderer of a *Brahmin*, and forfeits the right to the ceremonies, but is entitled to penance if he wishes it."

Fifth. "Persons who have not had the *upanayana* since many generations, according to the *Veda*, have not any kinds of penance, for the reasons stated in the fourth answer."

Sixth. "As the descendants of the *Vanedor* caste have not performed the *Veda* ceremonies since many generations, they have totally lost the right of performing the *soobha* and *asoobha* ceremonies in the language of the *Vedas*; and from the fourth answer it may be understood that the man of the present generation belonging to that family has no penance, and it is not consistent with the law that the *Brahmin* should perform the ceremony for such a man."

The *Pundit* of the Provincial Court for the Centre Division of *Madras*, having had the same questions referred to him, returned the following answer:—

"The *Brahmins* ought not to perform the ceremonies in the language of the *Veda* for the *Vaisyas*."

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

To which he subsequently added a further answer, and stated that in his opinion the Judges ought to pass a decision, awarding that the *Comaties* are to continue to perform their religious rites according to the rules laid down in the book called *Puranam*, as are at present observed by the corrupt or degenerate *Vaisyas* or *Comaties* and others.

The *Pundits* of the Provincial Court for the Southern and Western Division of *Madras* returned answers to the same effect.

On the 28th of *June* 1828, the Provincial Court, consisting of the Second and the Additional Judge (the First Judge being dissentient), passed a Decree, affirming the Judgment of the *Zilla* Court, but without costs.

The present Respondents filed a special petition of appeal to the *Sudder Dewanny Adawlut* of *Madras*, which the Court, pursuant to Regulation XV., 1816, sect. iv., cl. 4, allowed.

The Appellants neglected to put in any answer to the Respondents' special grounds of appeal, in the *Sudder Dewanny Adawlut*, whereupon that Court ultimately ordered, that the appeal should be heard *ex-parte*, and on the 25th of *March* 1833 the *Sudder Dewanny Adawlut* pronounced the following Decree:—

"The case of the original Plaintiffs lies in a narrow compass; they claimed the privilege of performing certain religious ceremonies which, they averred, were authorised by the *Vedas*. Their right to perform them is defended by the *Zilla Pundit* alone.

"The Court of *Sudder Adawlut* having maturely weighed the evidence produced, and considered the unbiassed and concurring opinions of the four law-officers of the Provincial Courts, entertain no doubt

as to the correctness of their exposition of the Hindoo law.

"The Court of *Sudder Adawlut*, therefore, determine to reverse the Decree of the Provincial Court of Appeal in the Northern Division, and the Decree passed by that Court is hereby reversed accordingly:" the Plaintiffs to pay all costs in the three Courts.

From this Decree the present Appeal was brought.

Mr. *Wigram*, Q.C., Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants.

This case is of considerable importance, affecting the rights of a very numerous class in *India*, to exercise what they conscientiously consider to be a very grave religious duty—that of performing, or having performed for them, religious ceremonies in the language of the *Vedas*. According to the constitution of the Hindoo society in *India*, as prescribed by *Menu*, (Inst. of *Menu*, p. 6, *plac.* 31, p. 15, *plac.* 91. 1 *Elphinstone's India*, 23,) they are divided into four chief classes or castes; first the *Brahmins*, of which division are the priesthood; second, the *Cshatriya*, or military class; third, the *Vaisya*, or trading class; and the *Soodra*, or servile class. The first three classes are declared to be *dwijativam* (twice born), and entitled to have the *soobha* and *asoobha* ceremonies performed by the *Brahmins* on their behalf, in the language of the *Vedas*. The *Soodras* are not entitled to this privilege. These religious ceremonies are laid down, and their great importance explained in the Institutes of *Menu*. (2 Chap. pl. 38 & 39. 1 *Elphinstone's India*, 71, 77.) The Appellants are *Comaties*, a subdivision of the *Vaisya* class, and are bound, to preserve caste, to perform these ceremonies in the language of the *Vedas*, having, of course, a *Brah-*

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

min to assist them; and the simple question is, have the *Brahmins* a right to interrupt them in the performance of their religious exercises? No party in *India* has a right to interrupt another in the performance of a mere religious duty. (2 *Strange's* Hindoo Law, pp. 261, 2, 3, 5.) It is said by the *Brahmins*, and insisted by the answer of the Defendants, that the third caste have ceased to exist in this *Cali yug*, or Iron age; and, moreover, if they did exist, the *Comaties* have forfeited all right to the exercise of these ceremonies, by the adoption of impure customs. Neither of these objections can be sustained. The *Vaisya* caste still exist. Their rights are recognised and provided for by all the authorities in force in *India*. (The *Mitacshara* by *Colebrooke*, p. 291; the *Daya-bhaga* by *Colebrooke*, p. 145; the *Dattaka Chandrika*, 55.) There was satisfactory *primâ facie* evidence in the suit to prove that the *Comaties* of the present day are, by reputation, of the *Vaisya* caste, and they are so recognised by recent writers on *India*. (*Buchanan* on the *Mysore*, p. 259; *Steele* on the Laws and Customs of the Castes at *Bombay*, p. 96; Professor *Wilson's* Catalogue of *Mackenzie's* Collection of MSS., vol. 2, pp. 109, 117, 133.) A loose performance of the religious ceremonies does not deprive a man of the privileges of his caste. (Professor *Wilson's* Lectures at *Oxford* in 1840, p. 8.)—[Lord *Brougham*: The Hindoo law is so highly ceremonial, that it may be considered, that the performance of it in a loose manner is no performance at all.]—In the present case we do not seek to compel the *Brahmins* to perform these ceremonies. It does not affect any question of civil right. All we seek for, is a declaration of the Court, that the *Brahmins* were not to interrupt us. The Courts exceeded

their jurisdiction in deciding that we had no right. If the *Brahmins* choose to exclude one of their fellows for having forfeited caste, and were to exclude him from commensality and the enjoyment of ordinary civil rights, a Court of Justice might have jurisdiction to entertain the question whether they were justified in depriving him of a civil right. *Nhanee v. Hureeram Dhoolubh* (a); but this case is merely a question of religion, introducing no infraction of civil right. The Court should have simply declared that we were to be protected from interruption in our performance of the ceremonies.—[Lord *Brougham*: In the nature of what is called in *Scotland* a declaratory action.]

The Decree of the *Sudder* Court cannot be maintained. It proceeded wholly on the opinions of the law-officers of the Provincial Courts, which were given upon a statement of the case extracted by the *Zilla* Court from the Respondents' answer, and is not binding on the Appellants. By clause 3, sec. x., of the *Madras* Regulation XV. of 1816, it is enacted, that "the Court shall consider and record the point or points to be established, respectively, by the Plaintiff or Appellant, and by the Defendant or Respondent, and shall proceed to take the evidence which may be adduced by either party upon such points, in the manner prescribed by the rules in force." And, by the 4th clause, it is further enacted that, "in like manner, if proof shall be required on any other points in the course of the trial, such points shall be recorded on the proceedings, and the proper party shall be called upon for the requisite evidence." This Regulation has not been observed by the

(a) 1 Borr. Bom. Sud. Rep. 84.

1845.

NAMBOORY SETAPATY v. KANOO-COLANOO PULLIA.

Courts. The point at issue was not clearly ascertained by the pleadings, nor did the Court record any point to be established: it is, therefore, a fatal objection to the competency of the suit. *Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver* v. *Rany Anga Moottoo Natchiar* (*a*). The Provincial Court sent the case back to the *Zilla* Court to take evidence, but did not, as required by the Regulation, define the points. The *Sudder* Court acted upon the opinions of the *Pundits*, and the opinion of the *Pundits* was formed upon a state of facts derived from the information of the opposing party. The Court had no right to use evidence, unless it was evidence given upon an issue formally propounded. What the Court ought to have done was—First, to have followed the Regulation; not to have looked at any evidence independent of it. Secondly, when they had got the evidence, they should have framed a case for the opinion of the *Pundits*.—[The Right Hon. Dr. *Lushington*: The mistake is, that the Judges make the first a question of law and not of fact—whether the Defendants were originally entitled; the next question is, whether such a right could be forfeited; and the third, by what circumstances, and then bringing in the facts. Instead of that, you have a state of facts which is neither admitted or proved.]—Nothing can justify a departure from the Regulation. The whole proceedings are irregular.

Mr. *Burge*, Q. C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

By the *Madras* Regulation III. of 1802, sec. xvi., cl. 1, jurisdiction is given to the Courts in *India*, and

(*a*) *Ante*, 278.

consequently the Appellate Court here, to entertain suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions. This disposes of the Appellants' objection to the competency of the Court below to entertain the suit; but even if that objection were tenable, it should have been taken in the Court below. The Appellants cannot withdraw from the Appellate Court, the cognizance of the very question, which they submitted to the subordinate Court.—[The Right Hon. *T. Pemberton Leigh*: Have the Courts in *India* the power to decide a right merely in the abstract?] In *Sri Sunkur Bharti Swami* v. *Sidha Lingayah Charanti* (*a*), damages were laid and assigned. No opinion was expressed by your Lordships upon that point. It was remitted to *India*, with a preliminary declaration for the Court to determine, in the first place, whether an action would lie by a grantee against a person not possessing a grant, assuming to be carried crosswise in a palanquin.

The next objection is, that the evidence was improperly taken. By sec. xviii., of Regulation IV., 1802, it is left to the discretion of the Court to supply with evidence anything which might be wanting.—[Lord *Brougham*: Regulation XV. of 1816, sec. x., cl. 3 and 4, is peremptory, that the Courts shall not consider any evidence, till they have the points properly raised.]—Neither can the objection, that the *Pundit's* opinions were improperly received, as being formed upon an assumed state of facts, be sustained. We have established by evidence, deviations, on the part of the Appellants' tribe, from the religious ceremonies prescribed by the *Vedas*, and the opinions were, that the effect of those deviations was to deprive them of the

(*a*) *Ante*, 198.

1845.

NAMBOOKY SETAPATY v. KANOO-COLANOO PULLIA.

right they claim. Upon the merits, it is clear from the evidence adduced, that the *upanayana* has not been duly performed, by or for the *Comaties*, for many generations, and that the religious ceremonies used by the *Comaties* of the Appellants' tribe were so performed, as to render them impure and of no efficacy. That being so, according to the Hindoo law, as correctly expounded by the *Pundits*, the Appellants' tribe are not entitled to the privileges of the *Vaisyas*, claimed by their plaint, and ought not to be permitted to exercise the ceremonies therein specified.

Lord BROUGHAM :

Before stating what the Judgment of their Lordships is, it is necessary that I should, upon two points, guard it from the possibility of misconstruction. One of those points is exceedingly important in this case, and with a view to the merits of cases of this description. The other is of equal importance in a more general view, with reference to other proceedings and other cases at large.

In the first place, their Lordships wish to guard very carefully against its being supposed, that in what they are about to do, namely, to reverse all the previous decisions, that is, of the *Zilla* Court, the Provincial Court, and the *Sudder Dewanny* Court, they give any opinion whatever upon the question, whether those Courts had a right to proceed, or had jurisdiction to proceed, to the determination of the question, as a matter of law merely. Whatever the inclination of their Lordships' opinion may be, that not having been the subject of argument, of discussion, or of decision below, they do not consider that upon that point they

are entitled, or that they are called upon, to give any judgment, and they gladly withdraw from it.

The other point is with respect to the operation of that most beneficial Regulation, XV. of 1816, sec. x., c. 3, to which I would add clause four, for that is even stronger and clearer than the third, showing distinctly that it is not directory, but mandatory and imperative. Holding the Regulation, generally speaking, but especially that part of it, with which we are more particularly dealing here, to be a most wholesome and beneficial Regulation, requiring to be most zealously guarded and most carefully kept in view, and if possible extended, as I hope it may be, to the other Presidencies (*a*), (but that is my own private opinion merely,) it would be highly inexpedient that any doubt should exist of the determination of their Lordships on all occasions henceforth, as on all occasions hitherto, (and I allude particularly to a Judgment which was pronounced last *June* (*b*), by my right honourable colleague, Dr. *Lushington*,) to abide by and support that Regulation. Nothing, therefore, to be done to-day, is to be taken, as in any way impeaching, or as doing otherwise than showing forth and testifying the high respect for that Regulation, which their Lordships continue to feel.

Having made these preliminary observations, I have only further to state the opinion of their Lordships, in which we all agree, and in which we have the concurrence of the able and learned persons who are the assessors of their Lordships in these Indian cases, that their Lordships think fit to determine that the

(*a*) This Regulation applies to *Madras* only.

(*b*) Srimut Moottoo Vijaya Raghanadha Gowery Perria Woodia Taver *v.* Rany Anga Moottoo Natchiar. *Ante*, p. 278.

1845.

NAMBOORY SETAPATY v. KANOO-COLA-KOO PULLIA.

Plaintiffs not having, in their opinion, alleged any case of injury done to them by the Defendants, upon which they were entitled to go into evidence, and not having, therefore, established any case for damages in their suit against the Defendants, no question remained but of a mere declaration of a right to perform certain religious ceremonies; that if the Courts below had jurisdiction to proceed to the determination of that question in this suit (upon which their Lordships guard themselves in their Judgment, as well as in the prefatory observations which I have made, against giving any opinion), the Plaintiffs have not produced sufficient evidence to establish such a right; that, under these circumstances, all the Decrees, therefore, ought to be reversed, and the plaint dismissed (the reversal by the *Sudder* Court amounts, in fact, to a dismissal of the plaint); but it is not, as it ought to be, a dismissal without costs; and that this decision should be without prejudice to the existence or the non-existence of the right claimed by the Appellants, in any other suit, in which such a question may be properly raised.

It is fit that I should add, in order to prevent all mistakes, and all applications to us, henceforth, on the subject, that the result of the decision of their Lordships clearly is, that all the costs of each party must be borne by that party, both in the *Zilla* and Provincial Courts, and the *Sudder* Court, and here. We do not deny that there is a right to give costs in the way in which the *Sudder* Court gave them; but we do not think that this was a case for it. There is also, no doubt, a right here to give costs to the party supporting the Decree; but it is very rarely done.

THE MOKUDDIMS of KUNKUNWADY - *Appellants*,

AND

THE ENAMDAR BRAHMINS of SOORPAL *Respondents*.*

On Appeal from the Sudder Dewanny Court at Bombay.

13th & 14th June 1845.

An award made by a *Punchayet*, settling a disputed boundary to land forming an Island, claimed by the inhabitants on the respective banks of the river, under circumstances, set aside, as having been made contrary to the provisions of *Bombay* Regulation VII. of 1827.

The decision of the Sub-Collector, appointed by the Government to settle the boundary, annulling the award of the *Punchayet*, and assigning a boundary, confirmed on Appeal.

Semble.—This Court will not encourage a mere objection of form, that does not affect the substantial merits of the case.

THIS Appeal arose upon a question of disputed boundary. The land, the subject of litigation between the Appellants, the *Mokuddims* (proprietors) of the village of *Kunkunwady*, in *pergunna Jumcundi*, in the Presidency of *Bombay*, and the Respondents, the *Brahmins* of the *enam* (revenue-free) village of *Soorpal*, in *pergunna Gotta*, in the same Presidency, was a small *gudda* or island called *Goheshwar*, which had been formed by the river *Krishna*, dividing itself from its original channel, into two branches, each branch running a short distance in a semicircular course, until the two again formed a junction, thereby enclosing the island in question. At what time the course of the river became so altered did not appear.

* Present: Members of the *Judicial Committee*,—The Lord President, (Lord Wharncliffe), Lord Brougham, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL

The dispute between the two villages, respecting the boundary line which passed through this island, had been going on for several centuries. It appeared that the exact quantity of land in dispute, consisted of one and three-quarters *chawurs*, and twelve and three-quarters *tanks* (equal to 80 acres). Both parties admitted that the true line of boundary would be defined by the course of what was formerly called the *Jukhur Sarel*, or stream, flowing through the island, but this stream had long since been choked up by earth and sand; and the two villages were at issue upon the question of what was its true course.

In the year 1833, orders were issued by the Principal Collector and Political Agent of *Zilla Dharwar*, in which *Zilla*, both the *pergunnas* of *Jumcundi* and *Gotta* were situated, to the *Mamlutdar* (revenue officer) of the *talook Indi*, in the same *Zilla*, to institute an inquiry into the matters in dispute, between the two villages, respecting their boundary, and at his instance, both parties agreed to refer the question to the decision of a *Punchayet* or Court of Arbitration, consisting of the *Zemindars* of the two *pergunnas*, in all nine individuals, who were to repair to the island, and make their award.

Accordingly, on the 7th of *November* 1833, certain instruments were entered into on the part of the Appellants and Respondents, by which they agreed to abide by the decision of these nine individuals, four of whom belonged to the *pergunna* of the Respondents, and five to the *pergunna* of the Appellants. These instruments consisted of a deed of submission, executed on behalf of the Respondents; a similar deed executed on behalf of the Appellants; and a joint deed executed on behalf of his Highness, the *Row*

Saheb, the proprietor of *Jumcundi*, and on behalf of the Appellants and of the Respondents; and the words of each instrument were, "We shall abide by whatever decision the above-mentioned nine individuals will pass."

Some parol evidence was entered into, and certain documents (including several plans of the locality of the property in dispute) were produced on behalf both of the Appellants and Respondents.

The *Punchayet*, however, took no steps towards deciding the case, and on the 20th of *December* 1833, a report was made by the *Mamlutdar* of the *talook* to the Collector and Political Agent of *Dharwar*, calling his attention to the importance of the case, and urging that a settlement of the question should be hastened. Some directions appeared to have been given towards this purpose, but nothing was done by the *Punchayet*, and after a long delay, in 1835, one of the nine referees being then ill and unable to attend, the Principal Collector and Political Agent of *Dharwar* directed the Assistant-Collector, Mr. *Bazett*, to proceed to the spot and pass a decision on the question. This was communicated by the Principal Collector and Political Agent to the *Mamlutdar* of the *talook*.

On the 3rd of *July* 1835, an Order was made by Government, for Mr. *Shaw*, the Sub-Collector of *Bagulcote*, to proceed to the spot and settle the dispute, thus substituting him in the place of Mr. *Bazett*; and Mr. *Shaw* at once proceeded to the spot; but before any decision was come to by the *Punchayet*, one of the nine arbitrators died.

The *Punchayet* made an award on the 1st of *August* 1835. This award noticed that the villages of *Soorpal*

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL.

maintained that their boundary extended as far as the *Jukhur Sarel*, and that the villagers of *Kunkunwady* maintained their boundary to be as far as the other side of the *Krishna* river, close by the village of *Soorpal*, as far as the temple of *Sri Buleswara*. It then noticed certain evidence which had been given, but did not purport to decide the question upon any evidence produced, on the one side or the other, but stated the ground of the decision as follows:—"It appears, on examining the land in dispute between the two villages, that from the branching of the holy river *Krishna*, to its being joined to the sea, there are several villages on both sides of the river, but it does not appear anywhere that the boundary of a village on one side is intermixed with the boundary of another village on the other side. Such being the case, therefore, it is contrary to the known usage of the country, that the villagers of *Soorpal* should dispute with regard to land on the front of the *Krishna* river on the western side, and in like manner it is wrong for the villagers of *Kunkunwady* to say that their boundary extends as far as the temple of *Buleswara*. Under these circumstances, the claims set up by the villagers of *Kunkunwady* and the villagers of *Soorpal* have been set at nought, and it is hereby decided as follows:—That the great holy river of *Krishna* runs from the front of the village of *Toopchee*, and then breaks forth from the south to the eastward. Now the villagers of *Kunkunwady* should confine their boundary to the west of the said river as far as the low-water-mark in the months of *Magh* and *Phagoon* (the two months in *India* in which the water in the river descends to a particular mark), and the villagers of *Soorpal* should confine their boundary on the east

of the said river. In this manner, neither the villagers of one nor of the other should claim their boundary beyond the edge of the river on each side."

Prior to the publication of this award, the inhabitants of *Soorpal* presented a petition to Mr. *Shaw*, wherein they complained that the arbitrators were under the influence of *Gopal Row Saheb*, the proprietor of the *Jumcundi*, and stated that "they were then kept in the place of *Kunkunwady*, where no one had the courage to go and speak to them. Under these circumstances," they proceeded, "we will not agree to any decision they may pass. We have already submitted all our papers and documentary evidence to the Government; therefore let the investigation be had in your honour's presence."

On this petition the following Order, bearing date the 5th of *August* 1835, was made :—"The petitioners are hereby informed that the members composing the *Punch* (or Court of Arbitrators) are present here, and have passed their decision by writing on the spot, as was written in the *razi-nama*. It is, therefore, requisite to be ascertained whether the petitioners are disposed to agree to abide by the said decision, or not. If the petitioners agree to the same, then let them act accordingly; but if the petitioners do not agree to the same, the whole of the papers, and documents, and the proofs of the enjoyment, &c., shall be duly examined, and a decision thereon will be passed by the *Huzzoor*, and the decree thereof will be delivered to the parties."

On communicating the above to the parties, the inhabitants of *Soorpal* said they were dissatisfied with the decision of the *Punch*, according to which, however, the inhabitants of *Kunkunwady* appeared

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL.

ready to act. Consequent upon the dissatisfaction expressed by the villagers of *Soorpal*, it was ordered that a decision should be passed, after further investigation, in the presence of the authority.

On the 6th *August* 1839, Mr. *Shaw* made his Decree, in which he stated, that he had read the *Punchayet* proceedings, and considered the decision of the *Punchayet* to be an unfair one: he stated also that he considered the *Punchayet* had been nullified; and decreed as follows:—"That the villagers of *Soorpal* should hold and enjoy the land beyond the *Jukhur Sarel*, and the village of *Kunkunwady* in like manner to enjoy the land on this side of *Jukhur Sarel*."

The Appellants appealed from this Decree, to the *Sudder Dewanny Adawlut* of *Bombay*, and filed their grounds of appeal on the 19th of *November* 1835.

The Respondents, in their answer, submitted that the *razi-namas* originally entered into between them and the villagers of *Kunkunwady* were invalid, according to the provisions of Reg. VII., sec. iii., cl. 1, of 1827, inasmuch as no time was limited for the *Punchayet* coming to their decision; they moreover urged that the deed of submission had become invalidated, by reason of the death of one of the arbitrators, named on their behalf, pending the award.

The cause came on to be heard before *Saville Marriott*, Esquire, the senior Puisne Judge, on the 28th and 29th days of *July* 1836, who after observing that the proceedings in the lower Court did not appear in all respects in precise judicial form, but as this defect would not affect the substantial merits of the case, the Court availed itself of the authority vested in it by Regulation XVII., 1827, sec. xxxiv., cl. 2, to

admit the same, recorded his opinion in the following terms :—

"The opponents in the southern bank of the *Krishna* river claim the whole of the island above mentioned, whilst a portion, and at times, even the whole, has been asserted by the northern inhabitants to be theirs. The protracted and violent disputes and affrays regarding boundary questions are notorious, and the present case affords a specimen of the violence and pertinacity with which they are often conducted. Not satisfied with confining the controversy within the *cutcherries*, the parties have occasionally resorted to arms to establish their respective claims, and in some instances, it would appear, lives have been lost, and it is quite obvious, from the papers in the case, that each party has had and held possession of the land in dispute according to the predominance of power or influence at the time in the field, or with the rulers of the country. Each has, therefore, been able to bring forward a mass of documents in support of their respective claims. Many of these, however, are either not authenticated at all, or else they bear an appearance, strongly indicative of being unworthy of reliance, further than that, as taken collectively, they evidenced the above-stated general unsettled state of things, and anarchy in the former administration of the country. Under such circumstances, the first question was, what would be the most likely mode of extracting the truth from such a mass of confusion? and it appears that a *Punchayet* was thought to be the best mode; and one was appointed, it would seem, by the *Mamlutdar* or *Sarrishtahdar*, but from the manner in which it was constituted, the Sub-Collector, for the reasons assigned by

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL.

him, very properly set aside its award as being absolute; it was not, in short, formed in the manner required by Regulation VII. of 1827, to make its judgment absolute, and from the circumstance that the majority, if not the whole, of the members belonging to the district of the Appellants, which belongs to the chief styled *Jumcumdikar*, it appears obvious that impartiality was not observed in forming the *Punchayet*. For these reasons, therefore, the Court overrules the plea advanced by the Appellants, that the *Punchayet's* decision was illegally and improperly superseded by the Sub-Collector. On the contrary, the Court is of opinion that the proceedings of that trying authority were perfectly legal and judicious, in respect to that point. The Sub-Collector moreover adopted and followed that course which, in the opinion of the Court, was the best, if not the only, mode for bringing the dispute to a satisfactory issue; and in the opinion of the Court every and great exertion was used in a highly judicious manner by the Collector to ascertain the respective merits of the claims of the parties, and thereon to found as equitable a decision as the difficult nature of the case could possibly allow, in all of which the Court is of opinion he succeeded, and that the Appellants have established nothing to justify either reversal or alteration in the judgment awarded."

The Appellants having presented a petition, praying for a new trial, which was refused, brought this Appeal to Her Majesty in Council.

Mr. *Charles Buller*, Mr. *Jackson*, and Mr. *Forsyth*, for the Appellants.

Both parties having bound themselves by the Deed

of reference to abide by the decision of the *Punchayet*, such award was of binding force and effect, between the parties, and it was not competent to the Respondents to set it aside, and act upon the decision of a different tribunal. Moreover, the decision of the Sub-Collector, which awards the *Jukhur Sarel* to be the boundary between the two villages without clearly defining its true position, which is the chief matter in dispute, leaves the main question undecided: they relied on the *Bombay* Reg. XVII. of 1827, and *Bombay* Reg. VI. of 1830.

Mr. *Wigram*, Q.C., Mr. *E. J. Lloyd*, and Mr. *Edmund F. Moore*, for the Respondents.

Though the submission to arbitration was properly executed, yet it did not constitute a reference within the meaning of the *Bombay* Regulation VII. of 1827. It did not specify any time within which such award was to be given, and regard being had to the course taken by the Government,—the appointment of the Sub-Collector for the purpose of deciding the dispute,—the death of one of the nine arbitrators,—the dissent on the part of the Respondents, and also to the circumstance that the award does not appear ever to have been filed, such award was not to any extent a binding decision on the parties, and the Decree of the *Sudder Dewanny* Court, defining the boundary, was fully warranted by the evidence.

The Vice-Chancellor KNIGHT BRUCE:

Their Lordships have felt, and even with the aid of the information communicated by the Appellants' Counsel, still feel, some difficulty in following some

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL.

parts of the proceedings below; with regard, however, to the objections merely of form, taken here on the part of the Appellants, after considering them, and especially giving due weight to the observations upon the reference made by the *Sudder* Judge, to chapter 2, sec. xxxiv., of Regulation XVII. of 1827, and upon the 4th and 5th sections of Regulation VI. of 1830, urged by the Appellants' Counsel, their Lordships, though not thinking those objections unreasonably taken, or without colour, do not feel disposed to accede to them.

The tendency of the Judicial Committee since its institution (as of the Privy Council before), has been, not to give way unnecessarily to objections of that nature; and in the present instance, the nature of the jurisdiction whence the appeal comes, the nature of the proceedings themselves, and the course pursued by the Appellants below, render it right, in their Lordships' judgment, to deal with the matter before them upon its substance and its merits. And the case so viewed has mainly two questions. First,—Ought the Court below to have treated the decision of the *Punchayet* as correct and binding? Secondly,—If not, had the Sub-Collector, Mr. *Shaw*, and the Court of *Sudder*, adopted the right line of boundary?

Upon the first question, the Appellants have conceded that the decision of the *Punchayet* is, by the *Bombay* Regulations of 1827, prevented from having the force of a judicial sentence, a judicial determination, or of a regular award in a technical sense; while the Respondents on their side have not denied, that it is receivable in evidence and to be considered as part of the materials in the cause. But its conclusiveness, denied by the Respondents, is asserted by the Appellants, who insist, that it was a binding agreement

between the parties to abide by the *Punchayet's* determination, which they say ought to be upheld. Their Lordships, however, are of opinion, that if there was in effect an agreement to abide by the *Punchayet's* opinion and determination, and if the opinion was expressed and the determination made, by those who it was agreed should do so, (a point not necessary to be decided,) it was nevertheless, and is, the right of the Respondents, to contend that the agreement and determination do not necessarily bind; and to bring forward all the circumstances of the case, for the purpose of showing it to be inequitable, that they should bind. In a word, to resist the Appellants' demand, so far as it rests on what the *Punchayet* did, on grounds analogous to some of those on which the specific performance of an agreement may be resisted in English Courts of Equity. What may be the rule in case of an effectual reference to arbitration, and an award, properly so considered, their Lordships do not think it necessary to say; for in their judgment, having regard to the *Bombay* Regulations of 1827, and the undoubted facts of the case, an effectual reference to arbitration, and an award, properly to be so considered, did not exist in the present instance: though, if there had been an award, their Lordships are not satisfied, that grounds do not appear upon which it is invalid, or might have been set aside. Viewed as matter of agreement, it is their Lordships' opinion, from the circumstances of the case, and the whole course of proceeding, that reliance cannot be placed on what the *Punchayet* have done, and that it would be unjust to enforce their decision against the Respondents.

With regard to the true line of boundary, their Lord-

1845.

THE MOKUDDIMS OF KUNKUNWADY v. THE ENAMDAR BRAHMINS OF SOORPAL.

ships think that there is sufficient evidence to show that fixed by the *Punchayet* not to be the true line,—a conclusion which they do not solely form from the circumstances, that it did not accord with the case alleged on either side. That the line fixed by the Judgments against which the Appellants have appealed is the true line, does not, in their Lordships' view, clearly appear; but the evidence does not prove any other line more probable. Assuredly the Appellants have not established, that either of these Judgments is substantially wrong; and as Mr. *Shaw* appears to have examined the surface of the disputed land himself, and to have bestowed care and attention upon the subject, it does not seem likely that any further investigation can materially advance the cause of truth or justice; their Lordships, on the whole, consider the right course to be, to dismiss the Appeal but without costs.

ANNE CASEMENT - - - - - *Appellant,*

AND

JOHN WILLIAMSON FULTON and Wife *Respondents.**

On Appeal from the Supreme Court of Judicature at Calcutta.

17th, 18th & 19th June 1845.

THIS was an Appeal from a sentence of the Supreme Court of Judicature at *Calcutta*, on the Eccle-

The 7th section of the Indian Will Act, No. 25, of 1838, enacts "that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence, and by his direction, and such signature shall be made, or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

A Testator signed his Will in the presence of a witness, who subscribed it in his presence; and some time afterwards, upon the arrival of another witness, the Testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the Will. The second witness then subscribed the Will, and the first witness, in his and the Testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at *Calcutta*), that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the Testator, and jointly subscribe it in his presence.

Whether the rules of the Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of Appeal, apply to an Ecclesiastical cause in the Supreme Court at *Calcutta*, so as to deprive a party of the Charter right to appeal within six months from the decree, &c. *Quære?*

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

1845.
CASEMENT v. FULTON.

siastical side, which rejected an allegation, propounding an instrument, bearing date the 14th of *April* 1844, as the Will of Sir *William Casement*, the deceased in the cause, late a Major-General in the service of the East India Company.

The allegation was filed by the Appellant, as the widow of the deceased, and his Executrix named in the instrument in question, propounding it for proof, in solemn form of law.

The Respondents were the next of kin of the deceased.

The allegation pleaded in substance, that the deceased, while resident at *Cassipore*, in the suburbs of *Calcutta*, was, on the 14th of *April* 1844, attacked by cholera (whereof he afterwards died), and being sensible of the dangerous character of his malady, expressed to Lieutenant-Colonel *Francis Spencer Hawkins*, his intention to leave the whole of his property to his wife, and requested him to lose no time in getting a Will prepared for him to execute, to carry out that intention, and nominating the Appellant Executrix, and Mr. *Browne Roberts* and Colonel *Hawkins* Executors, of such Will. That, pursuant to this request, Colonel *Hawkins* had a Will prepared at *Calcutta*, and on his return with the same to *Cassipore*, he found Mr. *Nicholson*, one of the medical attendants, in attendance upon the Testator, and immediately, in his presence, produced the Will in question to the Testator, who, after reading it over attentively, signed his name at the foot or end of the Will as he lay on his couch, and Mr. *Nicholson*, in whose sight and presence it had been signed, then took the Will and subscribed his name to it, at a table in the adjoining room, which stood in sight of the Testator's couch, there being no

other convenience for writing in the same room; and Colonel *Hawkins* and Mr. *Nicholson* then awaited the return of Mr. *Garden* from *Calcutta*, in order to complete the execution of the Will. That upon Mr. *Garden's* arrival at the Testator's, about two hours afterwards, Colonel *Hawkins*, who, with Mr. *Nicholson*, had continued in attendance upon the Testator, produced the Will, and requested him to attest the Testator's signature to it; Mr. *Garden*, however, required that the signature should be first acknowledged by the Testator in his presence, and the three went up to the couch where the Testator was still lying, when the Testator acknowledged his signature to the Will, and the same to be his Will, in the presence of Mr. *Nicholson* and Mr. *Garden*, present at the same time; after which, Mr. *Garden* subscribed precisely in the same manner, and under the same circumstances, as Mr. *Nicholson* had done; and Mr. *Nicholson* at the same time, having already signed and subscribed the Will, thought it unnecessary to subscribe the same again, but acknowledged his subscription, then already at the foot of the Will, both in Mr. *Garden's* presence, and in that of the Testator. The allegation further pleaded that the Testator was a British subject, and, at the time of his death, was domiciled at Fort *William*—that he left goods within the province of *Bengal*, and within the jurisdiction of the Court.

A caveat against granting probate of the alleged Will, having been entered on the part of the Respondents, they filed an exceptive allegation to the admission of the above allegation or condidit, protesting against the same for its nullity, its inapplicability, its indefinitiveness, its obscurity, and its insufficiency.

The admissibility of the allegation was argued before

1845.
CASEMENT v. FULTON.

Sir *Lawrence Peel*, Chief Justice, Sir *John Peter Grant*, and Sir *Henry Wilmot Seton*, on the 1st of *June* 1844, and the Court took time to consider its judgment until the 8th of *July* following, on which day Sir *Lawrence Peel* delivered the unanimous judgment of the Court, admitting the exceptive allegation, and rejecting the allegation propounding the Will, and decreeing the costs of both parties to be paid out of the estate.

On the 13th of *August*, the Proctor of the Appellant dissented from the sentence of the 8th *July*, and protested of the nullity of the same, and of a grievance, and of appealing from the same within the time allowed by the Charter (*a*). On the 12th of *December*, the Appellant filed her Petition for leave to appeal from the rejection of the allegation.

This Petition was opposed on behalf of the Respondents, and the matter argued before Sir *Lawrence Peel*, who gave judgment, allowing the appeal.

The Appeal now came on for hearing, when the Respondents' counsel took a preliminary objection to its competency; contending that, by the true construc-

(*a*) This part of the Charter is as follows:—"And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble Petition of any person or persons aggrieved by a judgment, decree, or decretal or other order or rule of the said Supreme Court of Judicature at *Fort William*, in *Bengal*, to refuse or admit his, her or their appeal therefrom, upon such terms and under such limitations, restrictions and regulations, as we or they shall think fit, and to reform, correct or vary such judgment, decree or orders, as to us or them shall seem meet. Provided always that no appeal shall be allowed by the said Supreme Court of Judicature at *Fort William*, in *Bengal*, unless the Petition for that purpose shall be preferred within six months from the day of pronouncing the judgment, decree or decretal order complained of, and unless the value of the matter in dispute shall exceed the sum of 1,000 pagodas.

tion of the Charter of Justice, which gave the Supreme Court ecclesiastical jurisdiction in *Bengal*, and directed that the Court should be governed by the same rules as the Ecclesiastical Courts in the Diocese of *London*, and the general principles and practice of the Ecclesiastical Courts which prevail in *India*, at the time when the Appellant filed her Petition for leave to appeal, namely, on the 12th of *December* 1844, her right of appeal was lost and pre-empted, no appeal having been asserted within six days. *Voet* (*a*), *Grey* v. *Greg* (*b*), *Schultes* v. *Hodgson* (*c*), *Lloyd* v. *Poole* (*d*), *The Ship Clifton* (*e*). That the latter part of the Charter giving six months time to appeal from all original judgments, decrees, or decretal or other rules or orders of the Court, did not take away the general Ecclesiastical law, which required that an appeal must be asserted within six days, and that, therefore, the Supreme Court could not legally grant leave to appeal after that time.

Their Lordships did not call upon the Appellant's counsel in support of the right to appeal, and reserved their opinion upon the objection until they gave judgment in the cause.

Sir *Thomas Wilde*, Mr. *F. Kelly*, Q.C., Dr. *Addams*, and Mr. *Kirwan*, for the Appellant; and

Mr. *Turner*, Q. C., Dr. *Harding*, and Mr. *Malins*, for the Respondents.

The question was, whether the requisites of the 7th section of the Indian Will Act, No. 25 of 1838 (*f*),

(*a*) Pandect. Lib. 49, Tit. 4. Alciatus de Appellatione, s. 9 & 29.
(*b*) 2 Add. 276. (*c*) 1 Add. 105.
(*d*) 3 Hagg. Ecc. Rep. 477. (*e*) 3 Knapp, P. C. Cases, 375.
(*f*) This section is a copy of the 9th section of the English Will

1845.
CASEMENT v. FULTON.

had been sufficiently complied with, the Will being signed by the Testator in the presence of only one witness, though acknowledged by him in the presence of two witnesses present at the same time, one of whom, having previously signed in the presence of the Testator, acknowledged his signature in the presence of the other witness, and both witnesses subscribed the Will in the presence of the Testator.

It was argued, that the acknowledgment of the first witness to his previous subscription was equivalent to re-subscription. That an important distinction existed between the 9th section of the English Will Act, 1 *Vict.*, c. 26, and the 7th section of the Indian Will Act, inasmuch as the former Act required that the witnesses should attest and subscribe, whereas, in the latter, the word attest is omitted, and the witness only required to subscribe. *Moore* v. *King* (*a*). *In the goods of Byrd* (*b*). *In the goods of Olding* (*c*). *Cooper* v. *Bockett* (*d*). *Ilott* v. *Genge* (*e*). *Hudson* v. *Parker* (*f*). That the words in the English Act, "attest and subscribe," in the 9th section, were borrowed from the Statute of Frauds, and should receive

Act, 1 *Vict.*, chap. 26, with the omission of the words, "shall attest." It is as follows:—

"And it is hereby enacted, that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the Testator, in the presence of two or more witnesses, present at the same time, and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

(*a*) 3 Curt. 243.
(*b*) 3 Curt. 117.
(*c*) 2 Curt. 865.
(*d*) 4 Moore's P. C. Cases, 419.
(*e*) 4 Moore's P. C. Cases, 265.
(*f*) 1 Rob Ecc. Rep. 14.

1845.

CASEMENT v. FULTON.

the same construction. *Harrison* v. *Elwin* (*a*). That by the Statute of Frauds, the validity of a subsequent acknowledgment by subscribing witnesses, of their signatures, was recognised in *Risley* v. *Temple* (*b*). *Grayson* v. *Atkinson* (*c*). *White* v. *The Trustees of the British Museum* (*d*). *Gryle* v. *Gryle* (*e*). *Peate* v. *Ougly* (*f*). *Ellis* v. *Smith* (*g*). *Burdett* v. *Spilsbury* (*h*). *Price* v. *Smith* (*i*). *Trimmer* v. *Jackson* (*j*). *Roberts*, on Frauds, ch. 5, p. 304-308, and Sir *E. Ryan's* Charge. *Smoult's* Rules, 2 vol. App. 51, were also referred to.

BENGAL SECRETARIAT LIBRARY.

Lord BROUGHAM:

25th July 1845.

General Sir *William Casement* being stricken with cholera, made his last Will in writing, on the 16th of *April* 1844, in his house, near *Calcutta*, and signed it, in the presence of *Simon Nicholson*, his medical attendant, who also subscribed it in his presence, being in the next room, a few yards from the General, and in full view of him. Another witness, *Alexander Garden*, was brought, some hours after, to the apartment, and signed it, after hearing the General acknowledge his subscription, and Mr. *Nicholson*, his fellow witness, also acknowledged his subscription. Moreover, both the General and Mr. *Nicholson* were present when Mr. *Garden* subscribed. The question, and the only question arising upon the *factum*, is, whether or not the subscription of the two witnesses was so made, as to comply with the statutory requisition, the signature of *Nicholson* being not made but only acknowledged in *Garden's* presence; and the determination of this

(*a*) 3 Q. B. Rep. 117.
(*b*) Skinner, 107.
(*c*) 2 Ves. Sen. 454.
(*d*) 6 Bing. 310.
(*e*) 2 Atk. 177.
(*f*) Comyns' Rep. 196.
(*g*) 1 Ves. Jun. 11.
(*h*) 6 Man & Gr. 386.
(*i*) Willes Rep. 1.
(*j*) Cited 4 Burn. Ecc. L. 102-182.

1845.
CASEMENT v. FULTON.

question must be governed of course by the construction put upon the statutory provision, which we may take to be that of the Indian Will Act, sec. vii., copied from the English Act, 1 *Vict.* c. 26, s. ix., with the single omission of the words "attest and" after "shall," and before "subscribe." We are clearly of opinion, that this alteration, can make no difference in the construction, and, therefore, we are to deal with the question, as if it had arisen upon the English Statute. The Court below held the execution not to be a sufficient compliance with the Act, and we have come, after a very full hearing of the case, and after deliberately considering the whole question, to the same conclusion, without any doubt or hesitation.

The Statute of Frauds (29 Car. II., c. 3, s. 5), requires the Will to be signed by the Testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been, that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things,—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act. But it is too late to raise any such objection; we may, nevertheless, observe, that the greatest Judges who have dealt with the subject have admitted the force of such considerations, and lamented the latitude given to the statutory provision by their predecessors, who first broke in upon its strictness. When Lord *Hardwicke*, in 1752, was first called upon to adopt this construction, he expressed that it had for a long while been

vexata quæstio; but still he felt the weight of authority too great to adopt the course he manifestly inclined to. *Grayson* v. *Atkinson* (2 Ves. Sen. 454). Two years after, the point was more solemnly considered in *Ellis* v. *Smith* (1 Ves. Jun. 11), and adjudged by the same great lawyer, who then had the assistance of Sir *J. Strange*, M.R., *Willes*, C.J., and *Parker*, C.B. All these eminent men expressed their opinion, that had the question been open, and that they were called upon now to decide it for the first time, they should not have held acknowledgments sufficient. But they found, on examining the cases, that the case was not *res integra*. It had been held, that acknowledgment was equivalent to signing, by Lord *Jefferys* (Skinner, 227), by *Trevor*, C. J. (Com. 197), and by Lord *King*, in *Dormer* v. *Thurland* (2 P. W. 260); nor was there to be found any conflicting authority except the supposed *obitur dictum* of Lord *Holt*, in *Lee* v. *Libb* (Carth. 35-8), of which *Willes*, C. J., said (1 Ves. Jun. 13), that "many things were ascribed to that great man, which, on examination, his Lordship had found never to have been said by him," and he adds, that "*obitur dicta*" were frequently "*nunquam dicta*." Their Lordships, therefore, all considered the matter as not "*res integra*" but "*res judicata*," and held that it was the safer and wiser course "*stare decisis*."

We are thus fully warranted in refusing to carry one step further, a construction which so great a weight of authority lamented, and showed to have been ill-advised in its inception, and we are left in no doubt how these eminent Judges would have dealt with the present attempt to extend the latitude already given. They never would have held, that a witness acknowledging his subscription in the presence of his fellow-witness

1845.
CASEMENT v. FULTON.

was equivalent to his signing in that fellow-witness's presence.

It is further to be observed, that the new Act expressly allows the acknowledgment of the Testator to be as good as the signature, adopting the construction put on the Statute of Frauds by judicial decision. But it says nothing of the witnesses acknowledging. This is a very strong argument in favour of rejecting the proposed extension; for surely, had the legislature meant to make acknowledgment equivalent to signing in both cases, the word acknowledge would have been repeated in connection with the attestation; which it is not.

Let us now see, then, if the other argument of the Appellants is better founded—that which denies the Statute to require a signature of both witnesses in each other's presence.

Here we must observe, that though the Act adopts the large construction, as regards acknowledgment, it imposes new requisitions, as to attestations. The Statute of Frauds did not require that the witnesses to the subscription of the Testator should be present at the same time. But the new Act does require this. The Testator shall sign in the presence of two or more witnesses, present at the same time; and no doubt this is a most wholesome addition, and one tending to secure the compliance with what was manifestly the intention of the legislature in the older Act; for, if one witness may be present one day, and another a different day, perhaps at an interval of years, how can we say that both attest the same fact, that important fact for which their presence is required—the capacity of the Testator? He might be sane one day and insane another; and thus his capa-

city would only be attested by a single witness, because his two different conditions would only have one witness each.

It is not, perhaps, so important that the witnesses should both sign in each other's presence; nevertheless, it is of importance, for it gives an additional security against fraud or mistake, the signature being an act—the acknowledgment only a word. But be the reason what it may, if the law has said that the witnesses must sign in each other's presence, we are bound; and there can be no reasonable doubt raised, that the words of the Act amount to this requisition—the Testator is to sign or acknowledge in the presence of the witnesses present at the same "time." He is not to sign or acknowledge before the witnesses present at different times. But here he has acknowledged before them, present at the same time. Then must the witnesses who subscribe be present at the same time? We think the words admit of no other construction, for it is "and such witnesses shall subscribe." Now this forms one sentence, with the preceding words, "present at the same time," and "such" must plainly be read,—such present witnesses, or such witnesses so being present at the same time. "Such" describes not merely the names of the witnesses, but all that is previously enacted respecting them. One quality of these witnesses is their being present at the same time. Therefore, we cannot limit the meaning of the large word of reference, "such," to the mere names or persons of the witnesses; it must embrace what had just been said of their presence; it must mean "the witnesses, &c., present at the same time."

To be sure, a very short end would be made of this

1845.
CASEMENT v. FULTON.

controversy, were we to read the enactment as we are called upon to do in the argument, and, stopping short at the early part of the section, we were to suppose that "executed in manner hereinafter mentioned," refers only to the signing or acknowledging by the Testator, and not to the attestation of the witnesses. But so extraordinary a construction would also make a short end of the whole provision, and would dispense with the necessity of any witnesses at all, and of any subscription by witnesses, whether in each other's presence or not; for the Statute very probably would be confined to the not executing by the Testator, and no further invalidity could possibly arise from any want of attestation. Nothing can be more hopeless than this argument. It is rested upon the supposed application of the word "execution" to the Testator's part alone; for they say that the Testator executes, the witnesses attest. But this is utterly untrue. The Testator does not execute; he makes and publishes. In truth, the word execute applies to a deed, rather than to a will, and occurs not at all in the 5th section of the Statute of Frauds. In the Statute of Wills, 32 *Hen.* VIII., and 34, 35 *Hen.* VIII., it occurs, but only as applied to other instruments than Wills; "other acts," as they are termed. It is certainly to be wished, that in framing Statutes, the same words should always be employed in the same sense, and that the introduction of new terms, in dealing with the same matter, should be avoided. Yet we cannot say that the word "execute" is used by the framers of this Act, in any other than a correct and technical sense. It is employed plainly to designate the whole operation, including both the signature or acknowledgment of the Testator, and the attestion of the sub-

scribing witnesses, and it is not used at all to designate the Testator's part alone. The same use is made of the word in the great case already referred to, of *Ellis* v. *Smith*. Lord *Hardwicke* (1 Ves. Jun. 16) afterwards uses execution to mean the whole operation. The Master of the Rolls (*ib.* 14) uses it in the same sense. The Chief Justice and Chief Baron use it to designate the making and publishing. Nay, the learned persons who drew up the present Appellant's case, and who use this argument, have, in one page of their case, used the word in all its senses, both as designating the making and publishing by the Testator, and the whole act of making, publishing, and attesting. We, therefore, at once reject the argument, grounded upon this commentary on the word executed.

Agreeing altogether, as we do, with the Court below, on the merits, we are relieved from the necessity of deciding the preliminary question, whether or not the proceedings of the Appellant pre-empt this Appeal. Had we differed with the Judgment below, we must have disposed of that question. It now becomes wholly unnecessary so to do. We only say that our present Judgment does not in any way touch it, and that we certainly give no opinion at variance with the law and practice of Doctors' Commons on this head. The question does not come before us.

The Judgment appealed from must be affirmed. The costs of all parties, both here and below, to come out of the estate.

HENRY FAWCETT and others - - *Appellants,*

AND

The JUSTICES of BOMBAY - - *Respondents.**

On Appeal from the Supreme Court of Judicature at Bombay.

19th & 20th June 1845.

By Stat. 33, *Geo.* III., c. 52, s. 158, (for, among other things, making better provisions for the good order and Government of the towns of *Calcutta, Madras* and *Bombay,*) assessments are directed to be made on the owners or occupiers of houses, buildings and grounds, "according to the true and real annual values thereof."

ON appeal by the Appellants, against a rate, made on the 13th of *February* 1844, for cleansing, watching and repairing the streets in *Bombay*, under the Statute 33 *Geo.* III., c. 52, s. 158,† upon certain warehouses and

* Present: Members of the *Judicial Committee,*—Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors,*—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

† "That it shall and may be lawful to and for the Justices of the Peace within or for the Presidencies of *Fort William, Fort Saint George,* and *Bombay*, respectively, for the time being, or the major part of them, from time to time assembled at their General or Quarter Sessions, to appoint scavengers for cleansing the streets of the said towns or factories of *Calcutta, Madras,* and *Bombay*, respectively, and to nominate and appoint such persons, as they shall think fit in that behalf, and also to order the watching and repairing of the streets therein, as they respectively shall judge necessary, and for the purpose of defraying the expenses thereof from time to time to make an equal assessment or assessments, on the owners or occupiers

Upon a rate made in pursuance of this Statute, the Quarter Sessions at *Bombay* assessed the annual value of a cotton pressing factory, having fixed machinery, upon the gross receipts, after making an allowance of ten per cent. for tenants' profits. Held by the Judicial Committee, reversing the Order of Confirmation of the Sessions, by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 and 7 *Wm.* IV., c. 96) that the building might reasonably be expected to be let for, to a yearly tenant.

premises situate at *Bombay*, and known as the Apollo Cotton Screw and Presses, belonging to the Appellants. The rate was appealed against, to the Quarter Sessions of *Bombay*, and was by that Court confirmed, subject to the opinion of the Supreme Court of Judicature at *Bombay*, upon the following special case.

By articles of agreement made and entered into on the 16th of *August* 1837, certain European, Mahomedan, Hindoo and Parsee merchants of *Bombay*, to the number of thirty, interested in the cotton trade,

---

of houses, buildings, and grounds, in the said towns or factories respectively, according to the true and real annual values thereof, so that the whole of such assessment or assessments shall not exceed in any one year the proportion of one-twentieth part of the gross annual values thereof respectively, unless any higher rate of assessment shall in the judgment of the Governor-General in Council, or Governor in Council, of the said respective Presidencies, become essentially necessary for the cleansing, watching, or repairing thereof, in which case the said Governor-General in Council, or Governor in Council, shall, and may, on any such urgent occasion, by Order in Council, authorise a further assessment, not exceeding in any one year the half part of the amount of the ordinary annual assessment hereinbefore limited; and that it shall be thereupon lawful for the said justices to make a further assessment according to the tenor of such order, and not otherwise, or in any other manner; and that all and every such assessment or assessments shall, and may, from time to time, be levied and collected by such person or persons, and in such manner, as the said justices, by their order in session, shall direct and appoint in that behalf, and the money thereby raised shall be employed and disposed of, according to the orders and directions of the said justices in session respectively, for and towards the repairing, watching, and cleansing the said streets, and for no other purpose; and that the said assessments being allowed, under the hands and seals of such justices, or any two or more of them, shall and may be levied by warrant under their hands and seals, or the hands and seals of any two of them, by distress and sale of the goods and chattels of any person or persons not paying the same within eight days after demand, rendering the overplus (if any be) to the same person or persons, the necessary charges of making, keeping, and selling such distress or distresses being first deducted."

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

agreed to carry on in copartnership together at *Bombay*, from the 1st day of *May* 1836, until the 30th day of *April* 1856, the business of storing, screwing, and packing cotton, in certain houses and premises known as the Apollo Cotton Screws, under the name, style and firm of the Cotton Press Company, and undertook to promote, by all possible lawful ways and means, the interest of the said copartnership, and agreed, that should any member of the said copartnership employ any other cotton screw or screws, than those belonging to the said Apollo Cotton Press Company, without previously assigning a satisfactory reason to the managing committee of the copartnership, such member should not only forfeit his dividend or dividends for the year, but a fine of one thousand rupees for each share in the copartnership, held by such member, should be levied.

Under the above agreement, which is in full force and operation, the Company are now in the occupation, as owners, of two large warehouses, situate respectively in *Marine* and *Apollo streets* within the Fort Walls of *Bombay*. In those warehouses, extensive and powerful machinery is erected and supported by strong masonry, and sunk in and affixed to the soil, by means of which cotton is compressed and packed into bales ready for shipment and exportation.

The purchase-money of the above buildings amounted to two *lakhs* of rupees; the cost of paying and erecting the machinery therein, amounted altogether to the sum of eight *lakhs* of rupees.

By the aid of cotton press machinery a bale of cotton, standing from four to four and a half feet high, when brought to the warehouse, is reduced to two feet, and then packed and corded very strongly ready for measurement and shipment.

No impressed cotton is exported from *Bombay*.

There are four other cotton screws existing, and in operation in *Bombay*.

The motive power in all these screws is applied by men using capstan bars, as in a ship, but in the presses of the Company, although the motive power is the same, and applied in the same manner as in their own and the other screws, less human labour is required, owing to the peculiar nature of the machinery.

The average total number of bales of cotton, annually prepared for exportation, at the several presses and screws in *Bombay*, amounts to about four hundred and fifty thousand.

Of this number, one hundred thousand bales, or two-ninths, belong to the members of the Company individually, and are prepared at their presses; of the remaining bales, two hundred thousand at the least are also pressed at the Apollo presses.

A rupee and a half is charged, as well at the cotton presses and screws of the Company, as at the private screws, for compressing and packing a bale of cotton.

No other charge is made, or fee received, by the Company or owners of the other screws.

The gross receipts of the Company during the year immediately preceding the assessment were ..... Rupees	450,000
The expenses of management, office, establishment, &c., keeping the property in repair, insurance, taxes payable to Government, including an allowance of ten per cent. on the gross receipts for tenants' profits, were .... Rupees	150,000
Leaving a net residue of Rupees	300,000

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

The cotton presses or screws in the island of *Bombay*, have not, previously to the present rate, been assessed, as improving the value of the buildings in which they have been erected and worked.

The rate which has been imposed by the Justices, under the provisions of the 33rd *Geo.* III., c. 52, sec. 158, has been confirmed on two principles: First, That the true and real annual value of the warehouses and premises, on which the Company carry on their business, is to be estimated according to the rent, at which the premises might reasonably be expected to let for a year, to a tenant enjoying all the profits and advantages which accrue to the Company, from the pressing of their own cotton under the terms of their partnership agreement: and that such rent must be assumed, for the purposes of the rate, to be the gross receipts of the Company, derived from pressing and packing cotton (whether belonging to the Members of the Company or not), or otherwise for the use of their warehouses, minus the actual expenditure incurred in the management and conduct of the business, repairs to the machinery and building, insurance, taxes payable to Government, and other outgoings, and a reasonable allowance for tenants' profits.

Secondly, That in estimating, for the purposes of the rate, the true and real annual value of the premises, by the rent, at which they might reasonably be supposed to let to a tenant from year to year, not entitled to the advantages enjoyed by the Company, under the terms of their partnership contract, the Justices must assume such rent to be the present gross receipts of the Company, less the disbursements, above mentioned, and reasonable allowance for tenants'

profits; for as the aggregate quantity of cotton annually exported from *Bombay*, must be divided amongst the five, and only cotton presses and screws, now existing, and in operation, the quantity prepared at one press or screw for exportation, cannot be diminished, without an increased resort to the others; and as the Justices could not assume, for the purposes of the assessment, a probable increase of employment in the other presses, so they cannot assume that there would be a decrease in the resort to the presses in question, if in the hands of a tenant. The Company, on the other hand, contend, that as the cotton presses in this island have never hitherto been assessed, as improving the value of the buildings in which they have been worked, they ought not now to be assessed on such improved value; but that even if they are liable to be assessed, on such improved value, that under the 158th section of the 33rd *Geo.* III., c. 52, the thing to be rated is the building, according to the true and real annual value thereof; that, therefore, the building, with the fixtures annexed, is the thing to be rated, and that its value is what it would let for, exclusively of the profits of the trade carried on therein, or that rent which the Company would be forced to pay, if the premises were not their own property; and that to rate the building upon the principle contended for by the Respondents, would be, not to rate the building, but to rate the industry and capital of the owners, and the quantity of labour and current expenditure which they laid out on the premises, and that inasmuch as it is impossible (otherwise than from the rate hereinbefore stated) to obtain evidence of what particular sum the buildings, with the machinery therein, would produce, if let at an annual rent, to persons

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

willing to carry on the same business therein, that the rent at which the buildings and machinery might reasonably be supposed to produce, would be a sum equal to the amount of six pounds per cent. on that sum which the erection of the building and machinery therein have actually cost the Proprietors.

Money invested in the erection of dwelling-houses, or warehouses, or buildings of any nature, in *Bombay*, does not produce, on the average, under any circumstances, more than six per cent. per annum, net profits.

The questions for the opinion of the Court are, whether the Company are rateable upon the principles on which the assessment has been made, or on either of those contended for by the Company, that is to say,—

First, Whether the machinery and presses have been properly taken into consideration, in estimating the assessible value of the premises, either as being part of the buildings and warehouses themselves, or as improving the annual value thereof, or whether the rate should not have been confined to the buildings alone.

Second, Whether, assuming the Court to adopt the affirmative of the first part of the above question, the rateable annual value of the premises is that at which they might be supposed to let to a tenant for a year, entitled to the advantages which the Company now enjoy under their partnership contract; and, if so, whether that rent has been properly estimated, by taking the gross receipts of the Company, minus the expenditure above mentioned.

Third, Assuming the Court to adopt the affirmative of the first, and the negative of the second question, the question then will be, whether the rent at which the premises might be supposed to let to a tenant for

a year, not entitled to the advantages now enjoyed by the Company under their partnership contract, should not be estimated by the gross receipts of the Company, less the deductions before mentioned, according to the second principles on which the rate was confirmed; or, whether it should be estimated by the amount, exclusive of the profits of the trade carried on therein, or that rent which the Company would be forced to pay if the premises were not their own property; whether the rateable annual value of the premises should be estimated by the gross receipts of the Company, less the deductions before mentioned, on either of the principles on which the rate has proceeded.

Whether the amount, for which the premises in question are liable to be rated, is not that sum exclusive of the profits of the trade carried on therein, which the Company would be forced to pay for them if the premises were not their own property; and whether, for the purposes of this rate, that sum must not be assumed to be rupees sixty thousand, or six per cent. on that sum which the buildings and the machinery therein have cost the Company.

If the Court should adopt either of the principles, on which the rate has been made, the rate is to be confirmed; should the Court be of opinion that the machinery has been improperly taken into consideration, in estimating the assessible value of the premises, the rate is to be reduced to rupees nine hundred.

And if the Court should be of opinion, that although the machinery has been properly included, the rent at which the whole would let to a tenant should be assumed at six per cent. interest, on the amount of capital laid out in the purchase and erection of the

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

buildings and machinery, then the rate is to be reduced to rupees three thousand.

On the 13th of *September* 1844, the Special Case was argued before the Judges of the Supreme Court, who thereupon ordered and adjudged, that the said rate should be confirmed, with costs.

The Appellants, having obtained leave of the Supreme Court, brought the present Appeal.

Mr. *F. Kelly*, Q. C., Mr. *S. Wortley*, Q. C., and Sir *John Bayley*, for the Appellants.

The judgment of the Court cannot be maintained. The principle upon which the warehouses and premises have been rated and assessed, is not the true or correct principle. It proceeds upon the authority of *The Queen* v. *The London and South Western Railway Company* (a). *The Queen* v. *The Grand Junction Railway Company* (b). Neither of these cases apply. They relate to poor rates, and have arisen upon Railways. The present is a highway rate founded upon the Statute 33 *Geo.* III., c. 52. The 52nd section directs the rate to be made on houses, buildings and grounds, according to the true and real annual value thereof; there is nothing which can include trade, profits, fixtures, or stock in trade, yet the rate imposed is a rate upon the profits, derived by the Appellants from the use and application of the machinery, employed by them within the warehouse and buildings. It is a rate upon the skill, industry, and personal exertions used and employed by the Appellants, in the exercising and carrying on of the business and the profits of the Appellants, especially derived therefrom. The rate has been made

(a) 1 Q. B. Reps. 558. (b) 4 Q. B. Reps. 18.

and assessed in the absence of any legal or sufficient proof of the rateable value, even if made on a correct principle. The proper allowances and deductions from the gross annual value of the premises have not been made, which are essential to ascertain the legal rateable value. The Court at *Bombay* made a deduction of ten per cent. on the gross receipts for tenants' profits, which is not a sufficient or proper allowance. In the cases of *The Queen* v. *The London and South Western Railway Company*, and *The Queen* v. *The Grand Junction Railway Company*, twenty per cent. was deducted. They have made no allowance for outlay of capital, or for a fund to restore. All they have done is to take for granted that the income and profits of the Appellants amounts to £30,000 a-year, and upon that they found the rate. The Statute, 33 *Geo.* III., c. 52, s. 158, says, "annual value," and this must mean as between landlord or tenant, such as would be obtained by letting. This construction is fortified by section 1, chap. 96, of the 6th & 7th *Will.* IV., which declares it to be the net annual value, that is, the rent at which the same might reasonably be expected to let from year to year, free from the usual tenants' charges. There is, moreover, a fatal objection; it does not sufficiently appear from the case, upon what property the rate is imposed.

Their Lordships stopped the Appellants' Counsel, and called upon

Mr. Sergeant *Channell*, and Mr. *O. Malley*, for the Respondents, to support the order of Sessions.

It sufficiently appears from the case what the principle was upon which the rating was made. It was

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

made expressly upon the premises called the Apollo press, and this description is correct. A toll-keeper is rated for the amount the tolls would procure. No difficulty can occur as to the identity of the property rated.—[Lord *Brougham*: Can you maintain that the value of the machinery is the value of the profits obtained by its working?]—The rate is ascertained at that sum, which a tenant might give with this advantage. —[Lord *Brougham*: The case does not show that. It shows that the Court has measured the value by the profits made by the Appellants.]—The Sessions did the same in *The Queen* v. *The London and South Western Railway Company* (*a*). This is not a case in which a building is used for the mere purpose of carrying on a trade in it, but it is by the building and machinery (which is part of the freehold) that the trade is carried on and the profit made. It has been established in *Rex* v. *Hogg* (*b*), *Rex* v. *Justices of Saint Nicholas* (*c*), *Rex* v. *Bradford* (*d*), *Rex* v. *Lord Granville* (*e*), *The Queen* v. *The Cambridge Gas Company* (*f*), that in estimating the annual value of buildings, all engines and machinery fixed to the freehold are to be taken into consideration, as enhancing the value. And the proper criterion of value is the amount of rent which it may be supposed that a tenant would give for the premises, with a view to use them for the same purpose as that for which the Appellants employ them—*The King* v. *The Inhabitants of Lower Mitton* (*g*)—such tenant being assumed to be in the same circumstances, and possessed of the same advantages for so using them,

(*a*) 1 Q. B. Reps. 558.
(*b*) 1 Term Rep. 721.
(*c*) Cald. 262. S. C. cited 1 Term Rep. 723.
(*d*) 4 M. & S. 317.
(*e*) 9 B. & C. 188.
(*f*) 8 Add. & El. 73.
(*g*) 9 B. & C. 810.

as the Appellants were: and this is the principle upon which the Courts have proceeded in *The Queen* v. *The London and South Western Railway Company* and *The Queen* v. *The Grand Junction Railway Company*, and by which this case must be governed. The peculiar advantage the Appellants enjoy in the monopoly of trade, is a fair ground for rating them at the gross receipts.

Their Lordships, without calling upon the Appellants' Counsel to reply, delivered judgment, by

The Vice-Chancellor KNIGHT BRUCE:

The question is, whether the Appellants, who by the rate in dispute, made the 13th of *February* 1834, have been assessed upon no less an amount than 300,000 rupees, have by it, under the Statute 33 *Geo.* III., c. 52, sec. 158, been duly and equally assessed as owners or occupiers of houses, buildings, or ground, according to their true and real annual value. Unless they have been so assessed by the rate, the Appeal is well founded. It has been argued for the Appellants, that it does not sufficiently appear from the materials before their Lordships, what the rate is, or of what house or buildings, ground or grounds, the Appellants have been assessed as owners or occupiers. If there is any foundation for this argument, or any importance in the point, it is in the Appellants' favour. But their Lordships not wishing to rest their decision upon it, decline giving any opinion upon the question. Assuming this objection to be out of the way—that is, assuming the rate to appear, and the Appellants to have been rated in respect only of rateable property, occupied by them, of a specified and properly ascertained nature—their Lordships think it manifest that the assessment, as far as the Appel-

1845.
FAWCETT v. THE JUSTICES OF BOMBAY.

lants are concerned, was on a wrong principle. If it was legitimate, or proper, to introduce into the calculation of the true and real annual value of the property in question, or to refer, for the purpose of the calculation, to the elements or circumstances which the Justices and the Court of Quarter Sessions have introduced, or referred to, other and further elements, or circumstances, ought also to have been referred to, or introduced, which do not appear to have been so introduced, and which cannot be assumed to have been so introduced.

An examination of the case of *The Queen* v. *The Grand Junction Railway* (4 Q. B. Rep. 18), in comparison with the case which was before the Supreme Court in the present instance, will sufficiently explain their Lordships' meaning in this respect. But are even the principles on which the decision in the Court of Queen's Bench proceeded, applicable to such a case as the present? Their Lordships are not satisfied that they are. If of two manufacturers in the same street, carrying on precisely the same kind of business, by means of fixed machinery, one makes an annual profit of £2,000 per annum, the other an annual profit of only £1,000 per annum, that circumstance, if the respective buildings and machinery do not materially differ in size, description, extent, or quality, cannot render the one liable to be assessed at a higher rate than the other. The greater or less degree of success, with which a trade or manufacture is conducted, in a warehouse, or manufactory, or other building, having or not having fixed machinery, depends on many and various contingencies and circumstances, of a nature foreign to the mere capabilities of the warehouse, manufactory, or building, and cannot

form a just ingredient, in any calculation, of its true and real annual value.

The test or definition afforded by section 1, of the Statute 6 & 7 *Will.* IV., c. 96, in these words—"The net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let, from year to year, free from all usual tenants' rates and taxes, and to the commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any necessary, to maintain them in a state to command such rent,"—seems to their Lordships substantially a correct test or definition to be applied under the Statute 33 *Geo.* III., c. 52. And they are satisfied that the application of the test or definition, to that which has been done in the present instance, is destructive of the rate. They are satisfied that no such principle was followed or kept in view. There must be judgment, therefore, for the Appellants, and the costs which they were ordered to pay below, if paid, must be refunded.

Their Lordships desire it particularly to be understood, that they do not mean to express or intimate any opinion against the rateability of fixed machinery, or any opinion how this case might have stood, if the business which at the warehouses, and with the machinery in question, the Appellants carry on, could not be carried on at *Bombay*, by any other persons than themselves, or in any other warehouse or place there, than the warehouse in question, or by any machinery, except the very identical machinery, used by them.

FRAM-JEE COWAS-JEE - - - *Appellant*,

AND

WILLIAM THOMPSON and HENRY KEBBEL *Respondents*.*

On Appeal from the Supreme Court of Judicature at Bombay.

20th & 21st June 1845.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprized the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at *Bombay*), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser.

THIS was an Appeal from a judgment for the Respondents, given on the 25th of *November* 1844, in an action of trover, on the plea side of the Supreme Court of Judicature at *Bombay*, in which the Respondents were the Plaintiffs, and the Appellant was the Defendant.

The Respondents, during the time to which the

* Present: Members of the *Judicial Committee*,—Lord Brougham, the Vice-Chancellor Knight Bruce, the Vice-Chancellor Wigram, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, Knt., and Sir E. Ryan, Knt.

transactions in question relate, were merchants of the City of *London*, carrying on business in co-partnership as lead and tin plate merchants, under the firm and style of *William Thompson* and Co. And the Appellant, during the same period, was a merchant and *Parsee* inhabitant of *Bombay*, and the sole owner of the ship *Buckinghamshire*.

The declaration was filed on the 23rd of *June* 1842, and alleged that the Respondents "were possessed as of their own property," of certain pigs of lead therein mentioned, and that the Appellant afterwards converted them to his own use.

The Appellant, confessing the conversion, pleaded to the declaration, one plea only, denying that the pigs of lead were the property of the Respondents in manner and form as they had alleged, and thereupon issue was joined.

Commissions for the examination of witnesses on behalf of the Appellant and Respondents were issued, and evidence taken in *London*, under them.

On the 25th day of *June* 1844, the action came on to be tried before the Supreme Court.

The case proved on behalf of the Respondents, was, that on the 12th of *November* 1841, while the ship *Buckinghamshire* was lying in the East India Docks in the Port of *London*, in charge of *William Stockley*, the ship's husband and manager, employed in that capacity on behalf of the Appellant, the Respondents employed their lighterman, to put on board the pigs of lead in question, in two parcels; and he received from the Respondents, with the lead, two forms of receipt, therein set forth, written wholly by their clerk. That on the same day the pigs of lead were duly put on board the *Buckinghamshire* by the

1845.
COWAS-JEE v. THOMPSON.

Respondents' lighterman, who handed in the forms of receipt for the mate's signature, and that he then duly signed them, and returned them to the lighterman, who, two or three days afterwards, returned them so signed to his employers, the Respondents, and that from that time, and during all the time of the transactions in question, those receipts for the lead were retained by, and had remained in the possession of, the Respondents. It was also proved on behalf of the Respondents, that the firm of Messrs. *Boggs, Taylor* and Co. (who were the real shippers of the lead) became insolvent, and stopped payment on the 18th of *December* 1841; that on the 20th and 29th of *December* 1841, whilst the *Buckinghamshire* still lay in the East India Docks, with the lead on board, possession of the lead was duly demanded on behalf of the Respondents, with an offer to pay all freight due upon it, and all other reasonable charges attending the re-delivering of it, which offer was refused on behalf of the Appellant, and that a certain bill of exchange for £1,218. 0*s*. 8*d*., which had been accepted by Messrs. *Boggs, Taylor* and Co., on account of the lead in question, remained in the hands of the Respondents unpaid, having been dishonoured by Messrs. *Boggs, Taylor* and Co. when it fell due.

The case of the Appellant was, that on the 30th of *October* 1841, the Respondents contracted to sell to Messrs. *Boggs, Taylor* and Co., 100 tons of British Pig Lead, "free on board, at £20 per ton, 6 months acceptance," "or 2½ per cent. discount, for cash," at the option of Messrs. *Boggs, Taylor* and Co., and that the lead in question was shipped in pursuance of that contract. That on the 2nd of *November* 1841, Messrs. *Boggs, Taylor* and Co. addressed a letter to Messrs. *Daniel*

Dickenson and Co., requesting them to insure the lead in question, and to accept two bills of exchange, drawn on them by Messrs. *Boggs*, *Taylor* and Co. for £1,500 each, dated respectively the 29th of *October* 1841, and the 1st of *November* 1841, payable respectively six months after date, on the faith of Messrs *Boggs*, *Taylor* and Co. placing in their hands the lead in question, or the bills of lading relating thereto, with other lead and with copper of the value of £2,000, which bills of exchange were accepted by Messrs. *Daniel Dickenson* and Co., on the 2nd of *November* 1841, and long before the shipment of the lead by the Respondents, and were handed over by them to Messrs. *Boggs*, *Taylor* and Co., and paid when due. That the policies of insurance were effected, and that Messrs. *Boggs*, *Taylor* and Co. were debited by Messrs. *Daniel Dickenson* and Co. with the costs of such insurance. That on the 16th of *November* 1841, the captain of the *Buckinghamshire*, without requiring the delivery to him of the receipts for the lead in question, before referred to, signed four bills of lading of the lead in question, dated the 15th of *November* 1841, prepared by Messrs. *Boggs*, *Taylor* and Co., describing it as shipped by Messrs. *Boggs*, *Taylor* and Co., and to be delivered to Messrs. *B.* & *A. Hormajee*, or to their assigns, which bills of lading were afterwards endorsed by Messrs. *Boggs*, *Taglor* and Co., in blank, and delivered by them to Messrs. *Daniel Dickenson* and Co. That on the 26th of *November* 1841, Messrs. *Boggs*, *Taylor* and Co., declining to pay for the lead in cash, accepted the dishonoured bill of exchange for £1,218. 0*s.* 8*d.* before mentioned, which was dated the 12th of *November* 1841, being the date of the shipment, and was drawn on them by the Respondents,

1845.
COWAS-JEE v. THOMPSON.

and was accepted by Messrs. *Boggs, Taylor* and Co., on account of the lead in question, and made payable six months after date.—The Appellant also proved that, according to the usage and custom of merchants in *London*, where goods are sold to be delivered free on board a ship, it is part of the seller's duty, under the contract, to ship them, but that in such cases the buyer, at whose risk they are from the time of shipment, is considered to be the shipper—that where goods are sold on a contract, to be delivered free on board, to be paid for by bill, and are shipped on board and a bill given, pursuant to the terms of the contract, it is the seller's duty, on receipt of the bill, to deliver up the mate's receipt (if any), to the buyer, and that the seller's retention of the mate's receipt, after such bill given and received by the seller, would give the seller no claim against the ship-owner or the broker, or the goods, and maintained that the possession by the Respondents, of the receipts for the lead, did not affect their property in it.

The Court, after considering the evidence, found that the pigs of lead were the property of the Respondents, as they alleged in their declaration, and thereupon judgment was given for the Respondents, from which the Appellant appealed.

Mr. *F. Kelly*, Q.C., Mr. *S. Wortley*, Q.C., and Sir *John Bayley*, for the Appellants.

In this case, your Lordships sit as a jury as well as judges; you have to find a verdict upon the facts contained in the evidence taken under the Commission.—[Lord *Brougham*: We try all the Court below tried; we are not a Court of Error.]—The question to be

decided is this; whether there was a complete and perfect delivery when the lead was put on board. If so, the *transitus* was at an end. If it was not, the legal possession was undoubtedly in the sellers, and they could stop the goods. We submit that the *transitus* was completed by the shipment of the goods. —[Lord *Brougham*: Mr. Justice *Le Blanc*, in *Busk* v. *Davis* (*a*), clearly lays it down that if anything remains to be done, between the buyer and seller, the goods may be stopped.]—By the terms of the contract between the sellers and the purchasers, the latter agreed to purchase the lead in question, and to pay for it by cash or bill, at their election, when delivered to them free on board a ship, to be named by them. The sellers accordingly delivered the lead, by their direction, free on board the ship *Buckinghamshire*, and having done so, delivered an invoice, stating that they had so done; and having been apprised of the purchasers' election to pay by bill, drew a bill upon them for the price of the lead, which bill was accepted by the purchasers and delivered to the sellers, and thereby the transaction of sale and delivery was completed. The shipment was a complete delivery to the purchaser within the terms of the contract, and the right to stop, *in transitu*, did not exist after such delivery. The circumstances of the lead being shipped on account of the purchasers, distinguishes the case from *Craven* v. *Ryder* (*b*), *Ruck* v. *Hatfield* (*c*), and *Thompson* v. *Trail* (*d*). In these cases the goods were shipped on account of the sellers. The taking the ship's husband's receipts

(*a*) 2 M. & S. 403.
(*b*) 6 Taunt. 433.
(*c*) 5 B. & Ald. 632.
(*d*) 6 B. & C. 36.

1845.

COWASJEE, v. THOMPSON.

was never intended, and did not operate in law, to control the right of possession or property in the lead, and its retention was accidental, and was alike devoid of such intention. It gave them no better title to the lead, than if they had delivered the mate's receipts to the purchasers, on receiving their bill in payment, the receipts being retained by them under circumstances which had no reference to the title. The Supreme Court has wholly disregarded the legal effect of the evidence given on the part of the Defendant, and has assigned to the Plaintiffs possession of the mate's receipts, an effect unwarranted by law, and the usage and custom of merchants. The object of the retention, was a question of intention for the Court to decide upon the evidence, and such evidence proved conclusively, that the sellers did not, after they received payment for the lead by bill, retain possession of the mate's receipts with the intention of continuing or retaining any property in, or control over, the lead. In the absence of any notice from the sellers to the Defendant or his agents, not to make out and deliver to the purchasers, bills of lading, the Defendant was bound to make out, sign, and deliver bills of lading to, and at the request of, the purchasers, to the holders of the bill of lading.

Serjeant *Channell*, and Mr. *Peacock*, for the Respondents.

The lead must not be considered to have reached its journey's end. The shipment was not a complete delivery of it by the sellers to the purchasers, and on their insolvency they were entitled to stop the lead *in transitu*. *Miles* v. *Gorton* (*a*). No case has

(*a*) 2 Cr. & Mee. 504.

been cited against the sellers' right to stop *in transitu*. The signing of the receipts by the ship's husband was an admission, that the lead continued to be the property, and subject to the order, of the sellers, and they retained their property in the lead, as long as they retained the receipts for it. The goods were sold under a contract to deliver them on board the ship to be named by the purchaser. In such a case, the seller retains his property in the goods, by taking a receipt for them, from the person in charge of the ship; and so long as he keeps this receipt in his own hands the shipment is not a complete delivery to the buyer. *Craven* v. *Ryder* (*a*). *Abbott* on Shipping (*b*). He still retains his right, if the receipt be refused him at the time of shipment, and the master afterwards sign and deliver a bill of lading to the purchaser who becomes insolvent, after the departure of the ship. *Ruck* v. *Hatfield* (*c*). Neither did the signing of the bill of lading to the purchaser affect the sellers' right to stop the goods. *Thompson* v. *Trail* (*d*). The receipts were the proper evidence of the sellers' property in the lead; the signing, therefore, by the captain of the vessel, of the bills of lading, for the lead, without requiring the delivery of the receipts for it, did not pass the sellers' property in the lead from them to third persons. In *Craven* v. *Ryder*, Chief Justice *Gibbs*, in giving judgment, says, "the person in possession of the lighterman's receipt, is the person entitled to the bill of lading, which ought to be given only to the holder of the receipt." No distinction exists in that case from the present, except in the

(*a*) 6 Taunt. 433.
(*b*) 6 Edit. 469.
(*c*) 5 B. & Ald. 632.
(*d*) 6 B.& C. 36.

1845.
COWAS-JEE v. THOMPSON.

form of the receipt. The receipt has never been parted with by the seller.

Lord BROUGHAM:

25th July.

Messrs. *Boggs*, *Taylor* and Co. bought of Messrs. *Thompson* and Co., in the city of *London*, 100 tons of British pig lead "free on board," at £20 per ton, to be paid for by acceptances, at six months, upon delivery on board, or in cash at 2½ per cent. discount; at the option of the sellers. The lead was delivered on board, and receipts taken by the lighterman, from the mate of the vessel, which vessel was chosen and indicated by *Boggs*, *Taylor* and Co., the purchasers. The sellers elected to be paid by acceptances at six months, which they immediately received from the purchasers, and the latter having failed soon after, both after they accepted the bill and after the master of the vessel had signed bills of lading. The question arose at *Bombay*, in an action of trover, by the Appellants, the dispute being, whether these goods were *in transitu*, so as to give *Thompson* and Co. a right of stoppage, or had reached their journey's end, and were completely vested in the purchasers, *Boggs* and Co., and their assignees, under the bill of lading.

It is proved beyond all doubt, indeed it is not denied, that when goods are sold in *London*, "free on board," the cost of shipping them falls on the seller, but the buyer is considered as the shipper. The argument of the Respondent and of the Court below, we must presume (having no note of the reasons for the judgment under Appeal), is, that the mate's receipt was never given up by *Thompson* and Co., to *Boggs*, *Taylor* and Co., and that, therefore, the sale was not completed, the delivery was imperfect, something remained

to be done, and the transaction was not finished, nor the *transitus* determined.

We are clearly of opinion, that the non-delivery of the receipt can operate nothing whatever, and on this plain ground, that *Thompson* and Co. ought to have delivered it up; it was their clear and bounden duty so to do; and it would be preposterous that they should avail themselves of their own wrong against the other party, whom they had injured. What possible right, could they have to retain the receipt, which belonged to *Boggs, Taylor* and Co., as much as any chattel in their possession? It is admitted by one of the firm, in a conversation sworn to by a witness, and not in the least contradicted by any other evidence, or by his cross examination, that if the receipt had been asked for, it would have been given up. This was a matter of course. Either a mere oversight, or a fraud, must have caused its being retained, after the acceptance was taken on the delivery of the goods—which acceptance was a payment in substance; for a payment in cash would have been made had the sellers preferred to lose the two and a half per cent. discount; therefore, they never can be heard, to set up the possession of the receipts against the purchaser of the goods. They were bound to give them up, in good conscience, and would have been compelled so to do, had a bill in equity been filed against them, and all actions, inconsistent with the equities of the purchasers, would have been staid—or trover might have been maintained for the receipts, at law: therefore, the argument fails entirely, which is founded on the possession of them.

Indeed, numberless reasons occur to show, that no such doctrine can have any foundation as the one on which the Judgment below proceeded. The lighterman

1845.
COWAS-JEE v. THOMPSON.

may, and generally does, take one receipt for all the goods he delivers, specifying each parcel. Then how can the complete delivery of each person's goods, and their property vesting finally in him, depend on the possession of a document which only one of them can by possibility hold? But the best answer to the position contended for, and the best removal of it from the case, is the obvious consideration, that the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the ship owner or his captain and mate; and no receipt being necessary, no non-delivery of it can affect the proceeding. Suppose the lighterman took no receipt, or, taking it, dropt it into the water, or otherwise lost it, shall it be said that the delivery of the goods is the less complete, when the stipulated price has been paid, or an equivalent for it taken in an acceptance according to the contract?

Does not the taking that acceptance, which was by the contract only to be given by the purchaser on the delivery of the goods, and to be given for each parcel as delivered, at once show that the delivery was completed, that nothing remained to be done, that the goods had reached their journey's end, and that they were no longer *in transitu* to be stopt?

The cases and authorities resorted to, prove really nothing in favour of the Judgment. *Craven* v. *Ryder* (6 Taunt. 433) differs materially from the present case, in having an order from the sellers to the captain, "to receive the goods for and on account of the Plaintiffs" (the sellers), and in the receipt expressly stating, that they were received for and on account of the sellers; and it was proved that this form had been recently adopted, for the express purpose of giving the shipper a

command over the goods, until the receipt should be given up for the bill of lading. It is true, *Gibbs*, C. J., says he should have held the same opinion had the receipt been in the old form; yet he says the change is a circumstance to be considered. Nor can we argue that it is otherwise, than an important distinction between that case and this. *Dallas*, J., who tried the cause, said, the jury were clear that the Plaintiff never had parted with the possession; so that he considered the fact of continuing possession as having been left to them. Moreover, there was evidence in the present case that by the custom of the trade, when goods were sold "free on board," the buyer is considered as the shipper, though the seller is to carry them for him to the vessel; and we know not if any such evidence was given in *Craven* v. *Ryder*. If that Judgment be understood to hold this evidence immaterial, then we are unable to concur with it.

In *Ruck* v. *Hatfield* (5 B. & Ald. 632), a receipt was tendered to the mate, who had the command, stating that the goods were shipped on account of the Plaintiff (the seller), but he refused to sign it, and delivered bills of lading; and *Abbott*, Chief Justice, held that the Defendant ought to have signed the receipt so tendered, which would have been an acknowledgment, that the goods were delivered on account of the Plaintiff.

In *Thompson* v. *Trail* (6 B. & C. 36), there was no mention of the goods being received on account of the Plaintiff; but though this is alleged to have been deemed immaterial, the case in Banc turned entirely on the question whether or not there was evidence of a conversion.

Reliance was placed on a passage in *Abbott* on the Law of Shipping, Part IV. c. 10. (p. 469, 6 Ed.), in

1845.
COWAR-JEE v. THOMPSON.

which the cases of *Ruck* v. *Hatfield* and *Craven* v. *Ryder* are cited. But in another passage of more distinctness, Part IV. c. 4, (p. 301,) the learned author says, that the master should take care not to sign a bill of lading before he has had the receipt returned, else he may make himself responsible to the shipper and the holder of the receipt. But he goes on to say, how he may make himself responsible, and in what event, in case the shipper has a legal right to have the goods delivered to his own order.

The question in all the cases between buyer and seller, which is the case here, is, whether, or not, anything remained to be done as between these two parties. The importance of keeping that in view and always attending to this, whether the question arises between these two parties or between one of them, the seller, and some third party, is well stated by *Le Blanc* J., in *Busk* v. *Davis* (2 M. & S. 403), and *Whitehouse* v. *Frost* (12 East. 621). In the present case, it is quite clear, that nothing whatever remained to be done, between the buyer and seller, unless it be that the former ought most certainly to have delivered up the mate's receipt, which he wrongfully, or by oversight, kept possession of, without the shadow of a right to it; and whether it be wrong or error, he is not the party to take advantage of this.

The Judgment below must be reversed. The costs below, if any have been paid by the Defendant (Appellant), must be returned to him, and the Plaintiff (Respondent), must pay the costs of the suit below.

ARCHIBALD FRANCIS ARBUTHNOT, GEORGE ARBUTHNOT, WILLIAM M'TAGGART and ALEXANDER MACKENZIE - - - - *Appellants*,

AND

JOHN BRUCE NORTON - - *Respondent*.*

On Appeal from the Supreme Court of Judicature at Madras.

9th Feb. 1846.

An assignment by a Puisne Judge of the Supreme Court at *Madras*, of the sum "equal to the amount of six months' salary," directed by the 6 *Geo.* IV., c. 85, to be paid to the "legal personal representatives" of such Judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge: and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 & 6 *Edw.* III., c. 16, and 49 *Geo.* III., c. 126, and, therefore, contrary to public policy.

THE question in this case was the validity of an assignment, made to the Appellants, by the late Sir *John David Norton*, a Puisne Judge of the Supreme Court of Judicature at *Madras*, of the sum of R. 25,000 (£2,500), which, by virtue of the Act, 6 *Geo.* IV., c. 85, was payable to his legal personal representatives, in the event of his death, while in possession of the office of Judge.

By the Act of Parliament, 6 *Geo.* IV., c. 85, intituled, "An Act for further regulating the Payment

* Present: Members of the *Judicial Committee*,—The Lord President (the Duke of Buccleugh), the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan.

1846.
ARBUTHNOT v. NORTON.

of Salaries and Pensions to the Judges of His Majesty's Courts in *India*," and which in its preamble recites, "That it was deemed expedient to make further provision for all such Judges, so as that the acceptance of their respective offices should not be the occasion of actual loss to their representatives, in the event of the death of any such Judges taking place after their arrival in *India*," it is, by the 5th section, enacted, "That when and as often as it shall happen that any such Judge should depart this life, while in possession of such office, and after the expiration of six calendar months from the time of his arrival in *India*, for the purpose of taking upon him the office of Judge, then and in such case the Court of Directors of the East India Company shall, and they are thereby required to pay, or direct and cause to be paid, out of the territorial revenues from which the salary of such Judge so dying should be payable, to the legal personal representatives of such Judge so dying as aforesaid, over and above what might have been due to such Judge at the time of his death, a sum equal to the amount of six calendar months' salary of the office of such Judge."

On the 23rd of *October* 1841, Sir *John Norton* was appointed a Puisne Judge of the Supreme Court of Judicature at *Madras*, where he arrived in *April* 1842, and entered upon his judicial duties, and died on the 24th of *September* 1843, while in the possession of his office, leaving the Respondent his executor and legal personal representative.

Upon the death of Sir *John Norton*, a sum of money, equal to one half year's salary (R. 25,000), became, in accordance with the terms of the beforementioned Act of Parliament, payable to his legal

personal representatives, which sum the Respondent, as such legal personal representative, received.

Previous to the month of *August* 1842, Sir *John Norton* had obtained certain pecuniary advances from the Appellants, who are merchants and agents at *Madras*; to secure the repayment of which, he made an assignment to them of a policy of insurance, effected on his life for £2,500; and subsequently becoming further indebted to the Appellants, he, upon their demand for additional security, addressed a letter to them, dated the 20th of *August* 1842, which was as follows:—

"Gentlemen,—I acknowledge to have received from you a second bill on Messrs. *Coutts* and Co., in favour of *Felix Pryer*, Esq. Now, for the repayment to you of the monies payable in respect of such bill, I pledge and make liable, not only the policy of insurance in your hands, and the other property made liable to you for previous advances; I further make liable for all such advances, including the monies in respect of the aforesaid bill of exchange, and do agree to assign, and do assign to you the sum of £2,500, payable to my personal representatives, in case I should die in possession of my office of one of the Judges of the Supreme Court; and do agree that this sum shall be received by, and be payable to you, as a further security for all such advances, and any balance I may owe to you."

At the time of the decease of Sir *John Norton*, a balance was due to the Appellants, amounting to the sum of Rs. 51,421. 13a. 8p.; and they claimed to be entitled to receive in part discharge of that balance, the sum of money which the Respondent had received in respect of the allowance directed to be made by the

1846.

ARBUTHNOT v. NORTON.

Statute before-mentioned, to the "legal personal representatives" of a deceased Judge in *India*.

On the 3rd of *April* 1844, the Appellants exhibited their Bill of Complaint on the Equity side of the Supreme Court of Judicature at *Madras*, against the Respondent, stating the facts and circumstances above set forth, and further stating that, under the aforesaid assignment of the 20th of *August* 1842, they, the Appellants, were entitled to have the said sum of Rs. 25,000 applied towards the payment and discharge, so far as the same would extend, of the balance of Rs. 51,421. 13a. 8p., due by the said Sir *John Norton* to them, the Appellants, as aforesaid, and praying that the said assignment, bearing date the 20th of *August* 1842, might be declared to be a good and valid assignment to the Appellants, of the monies payable under and by virtue of the said Act of Parliament as aforesaid; and that the Respondent might be decreed to be a trustee for the Appellants of the said sum of Rs. 25,000, so received by him under such Act, and that if the Respondent did not admit the correctness of the account so sent to him by the Appellants on the 2nd of *November* 1843, as aforesaid, then that an account might be taken of what was due and owing to the Appellants for and on account of the said Sir *John Norton*, deceased, and that an account might be taken of all sums of money received or to be received by the Appellants for and on account of the said policy of insurance, the Appellants offering to give credit for the same when the same should be received by them or their agents, and that the balance due to the Appellants after such receipts might be ascertained, and that the Respondent might be decreed to pay to the Appellants the said sum of Rs. 25,000,

so far as the same would extend, in discharge of such balance.

The Respondent by his answer admitted all the facts and circumstances hereinbefore stated; but submitted, as a matter of law for the judgment of the Court, whether or not the letter of the 20th of *August* 1842, was a valid and effectual assignment of the sum in question; and he insisted that such sum was not assignable or disposable by Sir *John Norton* as part of his estate.

The cause came on to be heard on bill and answer, on the 29th and 31st of *July* 1844, before the Supreme Court at *Madras*, and on the 12th of *September* 1844, judgment was pronounced by Sir *Edward Gambier*, Chief Justice, when the Court ordered and decreed that the Bill of Complaint of the Appellants should be dismissed without costs.

From this Decree, the Appellants brought the present Appeal.

Mr. *Kindersley*, Q. C., and Mr. *H. Prendergast*, for the Appellants.

Under the 6th *Geo.* IV., c. 85, Sir *John Norton*, having been six months in the possession of his office of Puisne Judge, acquired a right to have the sum of 25,000 rupees paid to his legal personal representatives, in the event of his dying while in such possession; he had, therefore, such an interest as was assignable in equity. The letter of the 20th of *August* 1842, constitutes a valid and effectual assignment of such interest. The question turns upon the words, legal personal representatives.—[The Vice-Chancellor *Knight Bruce*: The word personal is not to be found in

1846.
ARBUTHNOT v. NORTON.

the Statute of Distributions. I do not think there is any case in which the words, legal personal representatives, have been held to be next of kin.]—The cases in which Courts of Equity have decided that the words legal or personal representatives meant next of kin, have always been either upon the construction of a Will or a Deed, where it was evidently the intention of the testator or the parties to the Deed, to exclude executors or administrators. *Bridge* v. *Abbott* (*a*). *Palin* v. *Hills* (*b*). *Evans* v. *Charles* (*c*). *Bulmer* v. *Jay* (*d*). Here the question arises upon the words of the Act of Parliament, where the legal effect must be given to the words "legal personal representatives," this must mean executors or administrators. The intention of the Legislature is clear. A sum of money, equal to half a year's salary, is to be paid, to the legal personal representatives of a Judge dying in office—that can only mean the persons who shall represent his estate. The Court below proceeded on the assumption that Sir *John Norton* had no vested interest in this sum, and could not, therefore, assign it; but if the words of the Act of Parliament mean any thing, they make it part of his personal estate, and he had a right to select to whom it might go—he could choose his own executors. How can it be said that, if undisposed of, this sum would not form assets in the hands of his executors, and, as such, liable to the claims of creditors? If that is so, what is there to prevent him prospectively charging it by deed *inter vivos*? Many cases might be put, of property which could not, by any possibility, fall into possession in the party's life-

(*a*) 3 Bro. C. C. 224.
(*b*) 1 Myl. & K. 470.
(*c*) 1 Anst. 128.
(*d*) 4 Sim. 48.

time, and yet it is assignable, such as a *post obit* bond, payable at the party's death.

Then it is said, that the assignment of such an interest is contrary to the policy of law, and within the meaning of 5 & 6 *Edw.* III., c. 16, which was extended to *India* by 49 *Geo.* III, c. 126. This is not an assignment of salary; for the Act expressly calls it "a sum equal to half a year's salary." It is true that the law will not allow the emoluments of an office to be aliened, where the separation of those emoluments, from the office to which they are annexed, would be inconsistent with public policy. It will not admit the enjoyment of the emoluments to be in one person while the office remains in another. In the case of military half-pay, it is not merely a reward, but a retainer for future services; but here, when this sum becomes payable, the party must be dead.—[The Vice-Chancellor *Knight Bruce*: Have not the public an interest in seeing that a person holding the high office of a Judge, should not die in such circumstances, as that there should not be assets sufficient to defray the expenses of his funeral?]—In *Davis* v. *The Duke of Marlborough* (*a*), it was laid down by Lord *Eldon*, that a pension for past services might be alienated. Where there is no cure of souls, the profits of a Canonry may be assigned. *Greenfell* v. *The Dean and Canons of Windsor* (*b*). In the same way it has been held, that half-pay is not assignable, future services being contemplated. *McCarthy* v. *Goold* (*c*). *Gibson* v. *The East India Company* (*d*). *Stone* v. *Lidderdale* (*e*). But in none of these cases has it ever been held that a pension

(*a*) 1 Swan. 79.
(*b*) 2 Beav. 544.
(*c*) 1 B. & B. 387.
(*d*) 5 Bing. N. C. 262.
(*e*) 2 Anst. 533.

1846.
ARBUTHNOT v. NORTON.

given in remuneration of past services, and not for the purpose of keeping the party in a situation for future services, was not capable of being assigned.

Mr. *Chilton*, Q. C., and Mr. *Jenkins*, for the Respondent.

First. Upon the true construction of the 6th *Geo.* IV., c. 85, no interest in the fund thereby expressly directed to be paid to the "legal personal representatives" of a deceased Judge, vested in Sir *John Norton*, so as to enable him to assign or transfer the fund; on the contrary, the fund in question, being intended by the Legislature as a gift or gratuity, to arise and be payable only upon the decease of the Judge while in office, in order that the acceptance of office should not occasion loss to his personal representatives. We do not dispute that, where the term legal personal representative occurs in the Act of Parliament, it means executor or administrator, for the same hand is to receive it that is to receive the other part of his personal estate; but it is also clear, from the preamble, that the meaning of the Legislature was, that the next of kin of any Judge dying in office, are the persons who would be entitled, according to the Statute of Distributions. *Cotton* v. *Cotton* (*a*). *Robinson* v. *Smith* (*b*). *Styth* v. *Monro* (*c*). *Baines* v. *Ottey* (*d*). And we submit that, from the preamble of the Act, it is to be inferred that the Legislature intended to make some provision for the family of the Judge dying in office, to enable them to return home. If the Legislature had intended to give this benefit to the party

(*a*) 2 Beav. 67.
(*b*) 6 Sim. 47.
(*c*) Ib. 59.
(*d*) 1 Myl. & K. 465.

himself, irrespective of his family, why should not the Act have made the half year's salary payable in advance? But no; the party himself can never, by any possibility, become possessed of this sum. It is nothing but a bare possibility, and not coupled with any interest, and is, therefore, not assignable at law. *Jones* v. *Roe* (*a*).

Secondly. It is against public policy to allow this sum to be assigned. The distinction attempted to be made between a pension for past services, without reference to future employment, and that with reference to future employment, is untenable. The assignment is, therefore, void, as against public policy. *Lidderdale* v. *The Duke of Montrose* (*b*). *Davis* v. *The Duke of Marlborough.*

Mr. *Kindersley*, in reply.

The principle upon which Courts have held pensions and salaries of public officers inalienable, is, either that they are given to keep up the dignity of the office, or to ensure a due discharge of its duties. And it has been held in either case, that it is against public policy to assign such a salary. But the question here is, what is this half year's salary. It is obvious that it is given to prevent loss to the personal estate of the party, by his going out of this country to take office in *India.* Then, if it is to be considered as personal estate, and subject to debts, why may not the party himself pay a particular creditor in preference to the others?

(*a*) 3 Term Rep. 88; and see note to *Purefoy* v. *Rogers.* 2 Saund. Rep. 388 n. Ed. 1845. See also *Prosser* v. *Edmonds*, 1 Y. & Col. 481.

(*b*) 4 Term Rep. 248.

1846.

ARBUTHNOT v. NORTON.

10th Feb. 1846.

The Right Hon. Dr. LUSHINGTON:

The question in this case arises between Messrs. *Arbuthnot* & Co., who are merchants and bankers carrying on business at *Madras*, and Mr. *John Bruce Norton*, who is the son and executor of the late Sir *John David Norton*, who was one of the Puisne Judges of the Supreme Court of *Madras*; and it relates to a sum of £2,500, which is payable by virtue of the Statute 6th of *Geo.* IV., cap 85, and which is granted in the following manner (so far as relates to this question): "that when and so often as it shall thereafter happen, that any Puisne Judge of the Supreme Court of Judicature at *Madras*, shall depart this life, while in possession of the said office, and after the expiration of six calendar months from the time of his arrival in *India*, for the purpose of taking upon him the office of Puisne Judge, then, and in all and every of such cases, the Court of Directors shall, and they are thereby required to pay or direct, and cause to be paid out of the territorial revenues, from which the salary of such Puisne Judge, so dying, should be payable, to the legal personal representatives of such Puisne Judge, so dying, as aforesaid, over and above what may have been due to such Puisne Judge at the time of his death, a sum equal to the amount of six calendar months' salary of the office of Puisne Judge."

The sum on the present occasion, that is equal to the amount of six months' salary, is £2,500, and the claim of the Appellants is limited to that sum; and the question is, whether, under the circumstances, they are entitled to it, within the provisions of this Act?

Now it appears that some time anterior to the death of the late Sir *John Norton*, he, for a good and valuable consideration, purported to make an equitable

assignment of all his right and interest in this £2,500, to Messrs. *Arbuthnot*, in consideration of monies received from them; and the first question is, whether Sir *John Norton* had the power of making such an assignment, or whether, by virtue of this Act of Parliament, this fund was destined to go to some other persons, or in some other direction.

With regard to this sum of £2,500, their Lordships are all of opinion, that the intention of the legislature was to provide against a contingency, which had arisen in two or three antecedent instances, and which contingency, in cases to come, is specifically provided for by this Act of Parliament, viz. that a person taking upon himself the office of a Judge in *India*, and dying in the possession of the office, having been put to great expenses at the time of making his outfit from this country to *India*, might have some certain means whereby his estate would be enabled to be reimbursed that loss, in case of his death whilst in office.

Their Lordships think, that any construction of this Statute, which would appropriate this fund in any other way, would be against the whole intention of the legislature. Without saying what might be the meaning of the words which I have read, especially the words "legal personal representative," in any other case, and without reference to any other context or construction, the only question here is, what is the meaning of those words in this Act of Parliament; and we are all of opinion that they mean the executor or administrator of the Judge deceased, and that the money is to be taken as part of his general assets, and to be administered as such.

That being so, the second question is, whether it

1846.
ARBUTHNOT v. NORTON.

was in the power of Sir *John Norton* to assign this sum of money.

No question has been raised at all, that if it was in his power, the letter, which forms part of these proceedings, is sufficient to constitute an equitable assignment.

Now we consider the £2,500 to have been part of his estate, precisely in the same light, and precisely of the same description, as if it had been a policy of assurance upon his life; that is to say, a certain sum of money to which he would be entitled upon the contingency of a certain event; over which he had complete power of disposition by assignment in his lifetime, or by testamentary disposition, if he thought fit to exercise the power in that way.

With regard to the last question, which is a question certainly which their Lordships have thought deserving of greater attention and consideration than either of the preceding points that were discussed at the bar; viz. whether this assignment is against public policy or not,—we have come to the conclusion that it is not against public policy.

In giving this opinion, we do not in the slightest degree controvert any of the doctrines, whereupon the decisions have been founded, against the assignment of salaries by persons filling public offices: on the contrary, we acknowledge the soundness of the principles which govern those cases, but we think that this case does not fall within any of these principles; and we think so because this is not a sum of money which at any time during the lifetime of Sir *John Norton*, could possibly have been appropriated to his use, or for his benefit, for the purpose of sustaining with

decorum and propriety the high rank in life, in which he was placed in *India*. We do not see any of the evils, which are generally supposed would result from the assignment of this sum, inasmuch as during his lifetime his personal means would in no respect whatever have been diminished, but remain exactly in the same state as they were. It is for these reasons, that their Lordships are of opinion, that the Judgment of the Court below was erroneous, and that we are under the necessity of reversing that Judgment; but being all of opinion, that this was a case which it was necessary for an executor to have the judgment of a Court upon, we think under the special circumstances, that the costs on both sides, both here and in *India*, should be paid out of the fund.

JOHN COWIE and Others - - *Appellants,*

AND

WILLIAM REMFRY and Others - - *Respondents.**

On Appeal from the Supreme Court of Judicature at Calcutta.

10th & 11th Feb. 1846.

C. & Co. and *H.* & Co. were merchants at *Calcutta*. *H.* & Co. sold to *C.* & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to *H.* & Co., and submitted it to *H.* for his approval, when *H.* having objected to a particular word remaining, the broker took the sold note to *C.*, and informed him of *H.*'s objection. *C.* struck his pen through the word objected to by *H.*, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to *H.* & Co. The broker delivered to *C.* & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by *H.* & Co. against *C.* & Co. for non-performance of the contract contained in the sold note, the Supreme Court at *Calcutta* was of opinion, that the sold note alone formed the contract, and found for the Plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending *C.*'s alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract.

THIS was an action brought in the Supreme Court at *Calcutta*, to recover damages for the non-perform-

* Present: Members of the *Judicial Committee*,—The Lord President, (the Duke of Buccleugh,) Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., and Sir E. Ryan.

ance of a contract by which the Appellants (the Defendants) engaged to purchase of the Respondents (the Plaintiffs) a certain quantity of indigo.

The Appellants and Respondents both constituted mercantile houses at *Calcutta*.

The contract was made through the instrumentality of a broker of the name of *Holmes*, who then carried on business in partnership at *Calcutta*.

The breach of the contract consisted in the Appellants' refusal to receive and pay for 147 chests of indigo, being part of a much larger parcel delivered to the Appellants by the Respondents, and which the Appellants afterwards returned, and refused to receive or pay for, upon the ground that by the specific terms of the contract, they were authorised to reject these 147 chests, on account of the inferior quality of the indigo contained in them. The entire parcel consisted of 1,166 chests.

The declaration stated, that the Defendants and one *William Ainslie*, who was then without the jurisdiction of the Supreme Court, bargained for and bought of the Plaintiffs and *Robert John Dring* in his lifetime, and the Plaintiffs and *Dring* sold to the Defendants and *Ainslie*, a large quantity of indigo, being the whole produce of the season's indigo of two factories and six-sixteenths of the produce of the season's indigo of another factory, at the rate or price of 205 Company's rupees per factory *maund* for each and every *maund* thereof, free of brokerage, with the usual allowance on rejections, viz. on broken, dusts, washings, and on stuff inferior to the run of the parcels; delivery to be taken as the indigo should arrive, and to be paid for by the Defendants and

1846.
Cowie v. Rempry.

Ainslie to the Plaintiffs and *Dring* on delivery thereof; and that the Plaintiffs and *Dring* should have the option of giving the rejections at the price they might be valued at by one Mr. *A. Lacroix*, or to withdraw them; and that in consideration that the Plaintiffs and *Dring* would deliver the said indigo, Defendants and *Ainslie* promised the Plaintiffs and *Dring*, to take delivery of and accept the said indigo, and pay them for the same on delivery. It then averred that the produce of the two factories and six-sixteenths of the third factory amounted to 4,361 *maunds* and 11 *chittahs*, and that Plaintiffs and *Dring* were ready and willing to deliver, and tendered and offered to deliver, to the Defendants and *Ainslie* the said indigo as it arrived, and requested the Defendants and *Ainslie* to take delivery of, and accept and pay for, the same, and that Defendants and *Ainslie* accepted and paid for part of the said indigo; and assigned for breach, that they would not accept or pay for the residue, and alleged special damage.

To this declaration the Defendants pleaded three pleas:—First, that they did not promise as alleged; Secondly, that Plaintiffs and *Dring* did not tender and offer to deliver the residue of the indigo to the Defendants and *Ainslie* as alleged; Thirdly, that the said residue consisted of broken, dust, washings, and stuff, inferior to the run of the parcels, and that Defendants and *Ainslie*, in pursuance of, and according to, the terms of the contract, rejected the said residue. That the residue so rejected was afterwards valued by the said *Lacroix* at the price of 154 Company's rupees per factory *maund*; that the Defendants and *Ainslie* were always ready and willing to accept and pay for

such residue, according to the valuation of *Lacroix*, of which the Plaintiffs and *Dring* had notice; but that the Plaintiffs and *Dring* would not deliver the residue at that price or valuation, but withdrew the same.

The Plaintiffs took issue on all these pleas, and thereupon issue was joined.

On the 1st of *July* 1842, and before the trial of these issues, a commission to examine witnesses in *London*, on behalf of the Plaintiffs, and of the Defendants, was obtained.

Upon the return of the evidence taken under the commission, the cause came on for trial, before Sir *Lawrence Peel*, Chief Justice, and Sir *John Peter Grant* and Sir *Henry Wilmot Seton*, Justices of the Supreme Court, on the 22nd and 23rd of *November* 1843.

It was proved, on behalf of the Plaintiffs, that Messrs. *Whyte*, *Holmes* and Co. were brokers at *Calcutta*, and that that firm was employed by both Plaintiffs and Defendants, in negotiating the sale and purchase of the indigo, in the declaration mentioned; and in order to establish the contract declared upon, the Plaintiffs put in evidence the following letter written by *Holmes*, one of the partners in the firm of *Whyte*, *Holmes* and Co., dated the 19th *November* 1840, addressed to the Plaintiffs, and purporting to be the sold note of the indigo in question:—

"*Calcutta*, 19th *Nov.* 1840.

"Messrs. *Hamilton* and Co.

"Dear Sirs,—We have this day sold for you to Messrs. *Colvin*, *Ainslie*, *Cowie* and Co., the whole

1846.
Cowie v. Rempry.

produce of this season's indigo of the Big and Little Union, in *Kishnagur*, and 6-16ths of the *Mulnauth* factory, on the following terms, viz. :—

Quantity.... About 4,500 M^ds.

Price ..... Two hundred and five Co.'s rupees, per factory *maund*, free of brokerage, with the usual allowance on rejections, viz. on broken, dust, washings, and on stuff inferior to the ~~usual~~ H.C. run of the parcel.

Delivery.... To be taken as it arrives, and to be paid for on delivery. You are to have the option of giving the rejections at the price they are valued at by Mr. *A. Lacroix*, or to withdraw them.

"We remain, dear Sirs, yours faithfully,
"*Whyte, Holmes* and Co., *Brokers*."

This letter was proved to have been delivered by *Holmes* to the Plaintiff, *Woollaston*. And it was further proved, that at the time the letter was delivered to *Woollaston*, it contained the word "usual;" that *Woollaston* objected to the word "usual" remaining in, and required that word to be struck out. That, thereupon, *Holmes* took the letter to the Defendant, *Henry Cowie*, who struck out the word "usual" with his pen, and put his initials over it, for the purpose of vouching the expunction of that word, and that *Holmes* afterwards gave the letter to *Woollaston*, as the sale-note of the contract.

The Defendants objected to this letter being received as evidence of the contract, on the ground, that it was

not in itself a contract: that it was in its form a sold note, forming part only of a contract, and that to make it a contract, a corresponding bought note ought to be produced. That further, as a contract it was imperfect and not binding, under the Statute of Frauds, for want of the signature of the Defendants. The Supreme Court, however, received it as evidence, and gave leave to the Defendants to move for a non-suit.

It was proved by the Defendants, as part of their case, that on the 20th of *November* 1840, Messrs. *Whyte, Holmes* and Co. wrote, and sent to the Defendants, a letter of corresponding date with the sold note, and purporting to be the bought note of the indigo mentioned, which was as follows:—

" *Calcutta*, 19th *Nov*r. 1840.

" Messrs. *Colvin, Ainslie, Cowie* & Co.

" Dear sirs,—We have this day purchased on your ⁄₀ from Messrs. *Hamilton* & Co. about 4,500 *maunds* of indigo, being the present season's produce of the Big & Little Union in *Kishnagur*, & 6-16ths of the *Mulnauth* concern, on the follows terms, viz.

Price, Co.'s Rs. 205 ℔ F. Md. & 1°/₀ brokge from you, rejecting broken, dust, washings, & any thing that is inferior to the run of the parcels.

Delivery, To be taken as it arrives, & to be paid for on being delivered.

" Mr. *Lacroix* of our establishment is to examine the indigo, & state any that he considers to be inferior, & also to value it, & the other rejections, Messrs. *Hamilton* & Co. reserving for themselves the option of giving the rejections or not, as they may choose.

" We remain, dear sirs, yrs faithfy

" *Whyte, Holmes* & Co."

1846.
COWIE v. REMPRY.

It was further proved, that the deliveries of indigo under the contract made by *Whyte, Holmes* and Co. commenced on the 30th *November* 1840, and ended on the 14th *January* 1841, and consisted of 1,151 chests, or 4,361 factory *maunds*, and 11 *chittacks*, and that the whole of them were inspected and approved or rejected by *Lacroix*, the person named in the bought and sold notes, who attended all the deliveries, and made his rejections mostly in the presence of a Mr. *Savi*, one of the manufacturers of a large portion of the indigo, and that *Lacroix* valued all the rejected chests, which were afterwards accepted by the Defendants. That in the month of *December* 1840, the Defendants shipped for *London* 1,012 of the chests of indigo so bought by them of the Plaintiffs, and paid for as aforesaid, and afterwards sold the same by auction at the indigo sales in *London* in *July* 1841. That in *March* 1841, the Plaintiffs applied to Defendants, through Messrs. *Whyte, Holmes* and Co., to obtain the Defendants' consent to have the rejected chests of indigo, then in the bonded warehouse, sold by public auction, but the Defendants declined to interfere. That in *May* 1841, the Plaintiffs obtained from the bonded warehouse at *Calcutta* 147 chests of indigo, which included the whole number of chests rejected by the Defendants, and 10 chests beyond. That in *June* 1841, the Plaintiffs, by Messrs. *Holmes, Faudon* and Co., their brokers, sold the whole of the 147 chests received by them from the bonded warehouse, by public auction in *Calcutta*, at prices considerably less than the valuation of chests rejected by *Lacroix*, for being inferior, and which the Plaintiffs delivered at such valuation, without observation or objection. That between the 29th of *November* 1841, and 2nd of

February 1842, 64 chests of the indigo rejected by the Defendants, and part of the 132 chests which had been deposited in the bonded warehouse in *Calcutta* by the Defendants, and sold by auction in *Calcutta* by the Plaintiffs in *June* 1841, as aforesaid, arrived in *London*, and were put up for sale by auction in *London* in *April* 1842, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1,012 chests. That the 64 chests so sold in *April* 1842, were compared and examined with the 1,012 chests of indigo sold in *July* 1841, the rejected chests were contrasted with the accepted chests of the corresponding marks and parcels, and the 1,012 were found to be of very superior quality, and the 64 chests were found to be very far inferior to the general run of the 1,012 chests and to the accepted chests of the corresponding marks, and 57 of the said chests were then sold, at prices averaging one-third less than the sale price of the 1,012 chests.

The evidence given respecting the custom of merchants at *Calcutta* to deliver bought and sold notes, was conflicting; but the Court, upon the evidence in general, found a verdict for the Plaintiffs, for the difference of amount between the contract price of the indigo, and that at which the Plaintiffs sold the 132 chests, through Messrs. *Holmes, Faudon* and Co. in *June* 1841, and directed that the amount should be calculated by the prothonotary. The prothonotary calculated the amount of the damages, and assessed them at Rs. 26,035. 5. 11.

Upon the 26th of *January* 1844, the Defendants obtained from the Supreme Court, a rule to show cause why a judgment of nonsuit should not be entered, or why a verdict should not be entered for the Defen-

1846.
Cowie
v.
Rempry.

dants, or why a new trial should not be had, on the grounds, that the contract declared upon was not duly signed according to the Statute of Frauds, and that there was no written contract, and that the verdict was against evidence, or the weight of evidence.

The Plaintiffs showed cause against the rule, and the Court took time to consider their judgment, and on the 5th *March* 1844, Sir *Lawrence Peel* delivered judgment, that the Defendant's rule of the 26th of *January* 1844, should be discharged, with costs. This judgment proceeded on the ground that the sold note, put in by the Plaintiffs, alone evidenced the contract between the parties; and that the Plaintiffs, having proved the contract declared on, and the delivery of the whole quantity contracted for, it lay upon the Defendants to show, that they had rightly exercised their power of rejection, which the Court, upon the evidence in the cause, was not satisfied of, and was, therefore, of opinion that the Defendants were bound to pay the contract price for the indigo rejected.

From this verdict and judgment of the Supreme Court, the present Appeal was brought.

The Solicitor-General (Sir *F. Kelly*), Mr. *Hill*, Q. C., and Sir *John Bayley*, for the Appellants.

This was a contract by bought and sold notes, according to the usual mode of mercantile transactions at *Calcutta*; and it cannot be disputed that, if there be any variation in any material part, between the bought and sold notes, the contract is void and gone. *Thornton* v. *Mieux* (*a*). *Thornton* v. *Kempster* (*b*).

(*a*) 1 Moody & Malkin, 43. (*b*) 5 Taunt. 786.

Pitts v. *Beckett* (*a*). *Short* v. *Spackman* (*b*). *Hawes* v. *Foster* (*c*). *Smith's* Mercantile Law, 3 Edit. p. 455. There must be mutuality of contract. The sold note is a document which expresses only a sale; it cannot, therefore, even though signed by the intended buyer and seller, amount in law to a contract of sale and purchase, so as to satisfy the Statute of Frauds (29 *Car.* II., cap. 3, sec. 17), the contract required by that Act being a mutual agreement, binding on, and enforceable against, both parties, which a sold note is not. In this case, the sold note differs in many particulars from the bought note. But assuming the contract to be contained in the sold note alone, the note proved by the Plaintiffs was altered in a material particular, after it had been signed by the brokers, and was not, subsequent to such alteration, signed by the Respondents or any agent lawfully authorised on their behalf. The insertion of the initials H. C. above the erasure of the word "usual" in the note was not intended to operate, and could not operate, further than as an authentication of the erasure: it did not in law amount to a signature sufficient to bind the Appellants to the performance of the contract, so as to satisfy the Statute of Frauds. *Eastwood* v. *Kenyon* (*d*). *Allen* v. *Bennett* (*e*). *Stokes* v. *Moore* (*f*). The Court below thought that this case fell within the principle of *Rowe* v. *Osborne* (*g*), but we submit that the present is wholly different from that case. In that case there were none of the incidents of a bought note, in the mercantile acceptance of the term; the contract was

(*a*) 13 Mee. & W. 743.
(*b*) 2 Barn. & Adol. 962.
(*c*) 1 Moody & Rob. 368.
(*d*) 11 Add. & Ell. 438.
(*e*) 3 Taunt. 109.
(*f*) 1 Cox, 219.
(*g*) 1 Stark. *Nisi Prius* Cases, 140.

1846.
Cowie
v.
Rempry.

not effected through the medium of bought and sold notes, nor was it signed by the broker, but by the party himself; and Lord *Ellenborough* was of opinion that that was the real contract, and not the note of such contract, which was sent by the broker to the Defendant, and which varied from the contract itself. —[Lord *Brougham*: In *Hawes* v. *Foster* (*a*), the jury were desired to say, whether it was a bought and sold note; so here we are a jury as much as the Judges in the Supreme Court were.]—It cannot be contended that, at the time the broker went to *Cowie*, and he struck out the word "usual," the transaction was complete; and that the necessity of a bought note was dispensed with, by *Cowie* agreeing to the alteration. Suppose a draft release brought to one of the parties to have an alteration agreed to, his signing that alteration is not the formation of a contract. The mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement for a lease, will not constitute a signature within the meaning of the Statute of Frauds. *Stokes* v. *Moore*. This must be considered as a transaction effected by a broker between other parties, by means of bought and sold notes; and the effect of the bought note varying materially from the sold note, is to render the contract void. Nothing has been done to waive the effect of such variation.

Sir *Thomas Wilde*, and Mr. *Charles Buller*, for the Respondents.

The question is, whether this sold note, containing all the terms of the contract of the parties, is within the meaning of the Statute of Frauds. The bought note

(*a*) 1 Moody & Rob. 368.

was not necessary—the transaction was complete without it.—[Lord *Brougham*: The question is, whether this is a transaction of bought and sold notes. If it is so, the law is clear. *Rowe* v. *Osborne* was not a case of bought and sold notes.]—This note was signed by the party sought to be bound. There is no doubt whatever that *Whyte*, *Holmes* and Co. had authority to enter into the contract. *Holmes* tendered the note which contained the contract to *Woollaston* for his approbation, but upon his dissenting to the word "usual" remaining, he took it to *Cowie*; and the effect of his conversation with him was, that he agreed to it; with the word "usual" struck out of it. *Cowie* drew his pen through the word, put his initials over it, and handed it back to *Holmes* to be delivered to the seller. We have, therefore, a paper containing the terms of the contract, signed by the party authorised by the buyer, and delivered to the seller, with the approbation of the buyer. This was the signature of the purchaser for all legal purposes (before the delivery of the bought note); if it was not so, at the delivery, it never could be afterwards made a contract within the Statute of Frauds. The bought note was not the means of completing the transaction; it was not the means by which the fact of buying was known to the buyer: it was not delivered at the time. All the evidence goes to prove the contract complete without the bought note, and it not being the general custom at *Calcutta*, to complete mercantile transactions by bought and sold notes, there was no occasion for the bought note here, and the contract was a binding contract without it.

The Solicitor-General, in reply.

This is undoubtedly a case of bought and sold notes;

1846.
COWIE v. REMPRY.

the broker himself states that he delivered both a bought and a sold note. The contract, in such cases, is not binding upon either party until both are delivered. *Thornton* v. *Kempster* (*a*).—[The Right Hon. Dr. *Lushington* referred to *Humphries* v. *Carvalha* (*b*).]—That case is in our favour; it goes to show that the notes must correspond at the time that the contract is complete.—[The Right Hon. Dr. *Lushington*: There was parol evidence, that the seller acquiesced in the sale.]—There was no variation of the contract on the bought and sold notes. That case only shows that the authority might be disputed; the question was, whether the seller might reject it on other grounds than discrepancy.

The Right Hon. Dr. LUSHINGTON:

19th August 1846.

The Appellants and the Respondents were two mercantile firms at *Calcutta*. The Appellants were the purchasers of a large quantity of indigo from the Respondents, who brought an action against them, for damages for non-performance of a contract, dated the 19th of *November* 1840.

The Supreme Court was of opinion that the contract was solely constituted by a note, signed by Messrs. *Whyte*, *Holmes* and Co., the brokers employed by both parties, that note being dated the 19th of *November* 1840.

The Court being of opinion, that there had been a breach of this contract, gave damages, assessed in pursuance of the contract, to the Respondents, the Plaintiffs. The Appellants, the Defendants, contended that this sold note did not alone constitute the contract, but that the contract consisted of the sold note,

(*a*) 5 Taunt. 786. 1 Marsh. 355. (*b*) 16 East. 45.

and also of the bought note, bearing the same date, and signed by the brokers.

The Defendants also insisted, at the trial, that the Plaintiffs were bound to give in evidence the bought note as well as the sold note. The Court, however, was of a contrary opinion, and the Defendants produced the bought note as part of their evidence.

A question arose, as to whether it was customary, in *Calcutta*, to deliver bought and sold notes, and the Court declared, in its Judgment, that the evidence in favour of the custom preponderated.

The questions for us to decide, are, what document, or documents, constitutes the contract between the parties; next, what is the construction of the contract; and, lastly, whether the contract was void, or has been broken.

The facts of the transaction must be taken from the evidence of Mr. *Holmes* (a partner in the brokers' firm), who was living in *London*, and examined under a commission. He states, that his firm acted as brokers; that he communicated, as to the purchase, with Mr. *Henry Cowie*, one of the firm of the Defendants; that he wrote the sold note addressed to the Respondents; that Mr. *Woollaston*, one of the Respondents, objected to the word "usual,"—the word "usual" occurring in this manner: "Two hundred and five Company's rupees per factory *maund*, free of brokerage, with the usual allowance on rejections, viz., on broken, dust, washings, and on stuff inferior to the usual run of the parcel:" the objection taken was to the word "usual." He says, that he stated this objection to Mr. *Cowie*, who, he thinks, read the letter, struck through the word "usual," and put his initials, "H. C." over. Mr. *Holmes* adds, that he delivered this note, so

1846.
Cowie v. Rempry.

altered, to Mr. *Woollaston*, to bind the sale, as a contract between the parties.

Mr. *Holmes*, on his cross examination, states, that there was a bought note as well as a sold note. He says he delivered the bought note to the Defendants, for the purpose of their advising their friends of the purchase; he did not deliver it as a contract, but, subsequently to the day of the contract, for the purpose aforesaid. He says it was not then customary, at *Calcutta*, to deliver a bought note to the purchaser, or a note to the seller.

Mr. *Ferguson*, however, a witness of much greater experience, and whose opinion was adopted by the Court, sitting as a jury, says, he considered it "the invariable custom, at *Calcutta*, to deliver bought and sold notes: it was so in 1840, and it is so now."

Then, upon the whole of this evidence, we must determine what is the legal conclusion, as to the way in which it was the intention of the parties that the contract should be made, and whether any and what contract was made. According to the custom prevailing amongst merchants at *Calcutta*, the contract should have been by bought and sold notes, and the necessary inference is, that the parties intended to contract according to this custom: but this is not all; there is delivered to both parties a bought and sold note, according to such custom. The actual dealing corresponds with the usual practice. What is to be set off against this? nothing but the statement of Mr. *Holmes*, evidently a young and inexperienced person, who deposes that he did not believe such a custom to exist, though, at the very moment he was, *de facto*, following it. All the acts of the two parties show they were acting in observance of the custom. Mr. *Woollas-*

ton requires the sold note to be corrected, according to his sense of what the contract should be. Mr. *Cowie*, one of the Defendants, requires a bought note to be delivered.

Looking at all these facts, we think that if there be no other evidence, or circumstances to the contrary, we must come to this conclusion, that the transaction is to be considered as a contract by bought and sold notes, and to be governed by the rules applicable to such a contract. What is there in this case which militates against such a conclusion? The fact that after the sold note had been shown to Mr. *Woollaston*, and he had objected to the word "usual," the same note had been shown to Mr. *Cowie*, and as Mr. *Holmes* says, he thinks, read over by him, and afterwards, as he deposes, the word "usual" struck through, and the initials "H. C." of *Cowie's* name added by him.

It is contended, on the part of the Respondents, that the conclusion to be drawn from this circumstance is, that Mr. *Cowie*, by this act, so sanctioned the sold note, that he and his firm were bound, by all the conditions therein contained, that such note immediately constituted the contract between the parties, and if accepted by the Respondents, became binding upon the Appellants, entirely abrogating, *pro hac vice*, the customary mode of dealing by bought and sold notes, and all the legal results arising therefrom. It may be true, that merchants dealing *inter se* are not bound by any customary mode of contracting, and that they may adopt another and a different mode of contracting, if they think fit; but we are of opinion, that the presumption is strongly in favour of the custom, and that any alleged deviation therefrom must be strictly proved.

Now, what was the course of this transaction? Mr.

1846.
COWIE
v.
REMPRY.

Cowie, as the acting partner of his firm, communicates with Mr. *Holmes*, the broker, and they come to some understanding as to the terms on which the indigo is to be purchased. The custom of dealing by bought and sold notes having been proved, it must be presumed that Mr. *Cowie* intended so to deal, till the contrary be proved. Mr. *Holmes*, conceiving that he understood the terms agreed upon by Mr. *Cowie*, embodied them in the sold note, which he sent to Mr. *Woollaston*, the seller. There is neither proof nor presumption that Mr. *Cowie* saw this note before it was sent. Mr. *Woollaston* returns the note through Mr. *Holmes*, with an objection to the word "usual." Mr. *Holmes* has an interview with Mr. *Cowie*, and tells him that he cannot finish the transaction unless the word "usual" be struck out; and so far as it appears, it was for this, and this only purpose, that the sold note was shown to Mr. *Cowie*. Mr. *Holmes* thinks he read it; assuming he did, he read it for the purpose of considering whether he should comply with the demand made—whether he should consent to one professed and designated alteration; he was not (whatever might be the legal consequences) *de facto* required to read it, with a view to determine whether it contained the terms he intended to contract upon; first of all, was it intimated to him, that by the act he was asked to do, he would depart from the accustomed usage, and irrevocably bind himself and partners by that single note? This signature of the alteration can only be taken to indicate his approval of, or rather his assent to, that alteration.

We are of opinion that it would be exceedingly dangerous to the safety of all mercantile transactions, which so mainly depend upon usage, and the observance of it, if we were to infer from a circumstance of this

description, that the purchasers were bound by this sold note alone, contrary to the custom, contrary to the course of the transaction itself, thereby establishing a contract by an act not in itself purporting so to do, and of the consequences of which Mr. *Cowie* was not apprized, and which no mercantile man could be expected to surmise.

We are of opinion that the contract was not, as held in the judgment, evidenced by the sold note alone; but that it was a contract by bought and sold notes, according to the custom in use, and to be so dealt with. We think that the established usage of dealing in the mercantile world should be held in high respect; the very existence of such usage shows that in practice it has been found useful and beneficial; the presumption is in its favour, and no departure from it is to be inferred from doubtful circumstances, and especially not from circumstances, which, in the opinion of mercantile men generally, would not be conceived to produce any such consequences.

The Court below relied on the case of *Rowe* v. *Osborne*. Though this was only a decision at *Nisi Prius*, yet we acknowledge its weight, as being the opinion of a most eminent Judge (Lord *Ellenborough*), peculiarly conversant with mercantile contracts; but we think that case is so materially distinguishable from the present, that it is not only not directly applicable, as was admitted by the Court below, but that the principle on which Lord *Ellenborough* relied cannot be made applicable to the circumstances of the present case. In *Rowe* v. *Osborne*, the note delivered to the vendor was actually signed by the purchaser; the note of the contract afterwards sent to the purchaser differed from it. Lord *Ellenborough* held that the note signed

1846.
Cowie
v.
Rempfer.

by the purchaser constituted the real contract. The principle upon which Lord *Ellenborough* so ruled is not stated, but we apprehend it must have been this, that the signature clearly evidenced the consent of the purchaser to buy on the terms stated in the document; for that purpose, and that purpose only, could the document have been submittted to him, for his signature; and being so signed by him, the necessary and inevitable conclusion, in the absence of fraud, is, that he knew and approved of the terms, and expressed such approval by his signature. The vendor having assented to those terms, there was a complete contract between the two parties; and the very fact of such a signature by a party being contrary to the custom of buying by bought and sold notes (which are signed by the broker), showed that he relied upon himself, upon his own act and deed, in concluding the bargain, and not upon the broker, or on any note to be hereafter delivered to him.

The present case we think essentially different. Here the note received no signature from the party; it was submitted to the party, not for the purpose of considering if it contained his intentions, but solely and exclusively for the purpose of asking Mr. *Cowie's* consent to the removal of one word, and to that removal he consents, and affixes his initials in approbation of that removal, and nothing else. We cannot consider this as a proof of knowledge of contents, and consent to be bound by the whole instrument, abandoning the usual mode of contract by bought and sold notes. We have examined all the other authorities cited at the Bar, but we do not think they apply with sufficient closeness to require any further investigation.

We feel bound, therefore, to differ from the Supreme Court, and the Judgment they have pronounced, on this part of the case. We think that this must be considered as a transaction in the contemplation of the parties by bought and sold notes, and that the contract is contained in both of the notes, and not in one. If this be so, it is admitted that there is a material variation between the two notes; and then the consequence follows, from all legal principles, that no binding contract has been effected. To such purport is the decision of the Common Pleas in *Thornton* v. *Kempster* (5 Taunt. 786). To use the words of Mr. Baron *Parke* in another case, the parties never have contracted in writing *ad idem.*

For these reasons we are of opinion that the Judgment of the Court below must be reversed, and judgment be entered for the Defendants below, the Appellants here.

I must add, however, that this is the judgment of the majority of their Lordships, and that the Chancellor of the Duchy of Cornwall was inclined to have taken a different view of this case.

THE QUEEN, on the Prosecution of the BOMBAY GOVERNMENT,

AGAINST

EDULJEE BYRAMJEE and seventeen others.*

On Petition from the Supreme Court of Judicature at Bombay.

4th & 8th April 1846.

THERE were two petitions in this matter. The first was the petition of *Eduljee Byramjee*, a tent maker, late of *Bombay*, but now a prisoner at *Singapore*, undergoing sentence of transportation, presented

The *Bombay* Charter of the 8th *Dec.* 1823, (granted in pursuance of the powers conferred to the Crown by 4 *Geo.* IV., c. 71,) after providing "That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at *Bombay* shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved," proceeds thus:—"And we do hereby also reserve to ourself, our heirs, and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary, such Judgment or determination as to us or them shall seem meet."

Upon a Petition, praying for leave to Appeal from a conviction for felony: held by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the Charter, to allow Appeals in criminal cases, such Appeal being confined to civil cases only.

* Present: Members of the *Judicial Committee*,—The Lord President (the Duke of Buccleuch), the Vice-Chancellor Wigram, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir E. H. East, Bart., Sir A. Johnston, and Sir E. Ryan.

on behalf of himself and eight *Parsees*, also undergoing sentence of transportation at *Singapore*, and praying that Her Majesty would be graciously pleased to direct the issue of a free pardon to the Petitioner and the other convicted parties; or that Her Majesty would be pleased to refer the matter of the Petition, and the case of the Petitioner, with the circumstances of the trial, to the consideration of the Judicial Committee of Her Majesty's Privy Council, to report thereon, or that Her Majesty would be pleased, by and with the advice of Her Privy Council, to make such order for the admission and prosecution of an Appeal from the Judgment of the Supreme Court, and that Her Majesty would in like manner be pleased to make an order for the production of true and exact copies of all evidence, proceedings, judgments, decrees, and orders, had or made in the prosecution in the Supreme Court, and of the Judges' notes of the evidence taken before the Court, and of the reasons given by the Judges of the Court, and also the evidence taken before the Chief Magistrate of *Bombay*, by the direction of the Chief Justice of the Supreme Court, and all papers in the possession of the Right Honourable the Earl of *Ripon* (the then President of the Board of Control) and the Secretary of State, relating to the trial and the case of the Petitioner, and for the taking any necessary evidence, and that Her Majesty would be pleased to reform, correct, or vary such Judgment,

Held also, that the Charter having been granted by the Crown, by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: and that the Supreme Court alone has full and absolute power, to allow or deny permission to appeal in criminal cases.

Semble. No Appeal lies, in cases of felony, to the Queen in Council, from any of the dominions of the Crown of *Great Britain*, which are governed by the law of *England*.

1846.
THE QUEEN v. EDULJEE BYRÂMJEE.

and make such further or other order in the forms, as to Her Majesty might seem meet.

The Petition set forth that an indictment was preferred in the Supreme Court of Judicature at *Bombay*, in the second sessions of the year 1844, against the Petitioner and seventeen other persons, *Parsees*, for the murder of a *Parsee*, named *Muncher-jee Hormusjee*. That the Petitioner and sixteen others were charged as accessories to the murder. That the trial took place on the 17th *July* 1844, and lasted ten days, before Sir *Henry Roper*, Chief Justice, and Sir *E. Perry*, Puisne Judge, and a Jury of Europeans, when the Jury returned a verdict of guilty against ten, including the Petitioner, and acquitted the remainder of the parties charged. That the Petitioners presented a Petition to the Judges of the Supreme Court, for leave to Appeal to Her Majesty in Council, against the direction of the Chief Justice, and the verdict and conviction founded thereon, upon the grounds and under the circumstances therein specially set forth. That such Petition was not complied with by the Judges, but that the extreme penalty of the law was carried into effect against one of the parties charged, and the remainder were sentenced to be transported for life to *Singapore*.

The principal allegations contained in this Petition, were verified by affidavit.

The second Petition was presented on the part of upwards of six thousand inhabitants of *Bombay*, and after setting forth, in substance, the circumstances contained in the first-named Petition, prayed that Her Majesty would be pleased to exercise her prerogative of mercy, in favour of such of the convicts as she might deem entitled to remission of their sentences, and to grant them pardon.

Both Petitions were referred by the Crown to the Judicial Committee of Her Majesty's Privy Council, and now came on for hearing.

Mr. *Hill*, Q. C., and Sir *John Bayley*, in support of the first Petition.

The jurisdiction of Her Majesty in Council, to entertain Appeals in criminal sentences in *India*, is undoubted. *Poonekooty Moodeliar* v. *The King* (*a*). *Aga Mahomed Kurboolie* v. *The Queen* (*b*). Both these cases were upon indictment.—[Sir *E. Ryan*: These are cases in which the Appeal was allowed by the Court below, which differs from the present application.]—The Charter of Justice, of *Bombay* (*c*), gives a right of Appeal, in all indictments, informations, and criminal suits, and expressly reserves to the Crown the power to refuse or admit an Appeal from any Judgment or

(*a*) 3 Knapp's P. C. Cases, 384. (*b*) 4 Moore's P. C. Cases, 239.

(*c*) The following are the clauses relating to the Criminal Jurisdiction, and the right of Appeal to the Queen in Council, as contained in the Charter, or Letters Patent, of the 8th *December* 1823, for establishing the Supreme Court of Judicature at *Bombay*.

Supreme Court, a Court of Criminal jurisdiction, and of Oyer and Terminer.

"And it is our further will and pleasure, and we do hereby grant, order, ordain, and appoint, that the said Supreme Court of Judicature, at *Bombay*, shall also be a Court of Oyer and Terminer, and Gaol delivery, in and for the town and island of *Bombay*, and the limits thereof, and the factories subordinate thereto; and shall have and be invested with the like power and authority, as Commissioners, or Justices of Oyer and Terminer, and Gaol delivery, have, or may exercise, in that part of *Great Britain* called *England*, to enquire, by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses, and other crimes and misdemeanors heretofore had, made, done, or committed, or which shall hereafter be had, done, or committed, within the said town and Island of *Bombay*, or the limits thereof, or the factories subordinate thereto." [The Charter then proceeds to give authority to the

1846.
THE QUEEN
EDULJEE BYRAMJEE.

determination of the Supreme Court, upon such restrictions and regulations, as the Crown shall think fit

---

Court to issue a precept to the sheriff to summon juries and witnesses, with power to punish for contempt, &c.] "And to proceed to hear, examine, try, and determine the said indictments and offences, and to give judgments thereupon, and to award execution thereof. And in all respects to administer criminal justice in such or the like manner and form, or as nearly as the condition and circumstances of the place and the persons will admit of, or as our Courts of Oyer and Terminer and Gaol delivery do or may in that part of *Great Britain* called *England*, due attention being had to the religion, manners, and usages of the native inhabitants.

The Court of Oyer and Terminer may reprieve execution of any capital sentence, until the King's pleasure is known.

"And whereas cases may arise wherein it may be proper to remit the general severity of the law, we do hereby authorize and empower the said Court of Oyer and Terminer and Gaol delivery to reprieve and suspend the execution of any capital sentence wherein there shall appear, in the judgment of the said Court, a proper occasion for mercy, until our pleasure shall be known. And the said Court shall, in such case, transmit to us, under the seal of the said Court, a state of the case, and of the evidence, and of the reasons for recommending the criminal to our mercy, or for such reprieve or suspension, as the case may be: in the mean time, the said Court shall cause such offender to be kept in strict custody, or deliver him or her out to sufficient bail or mainprise, as the circumstances shall seem to require.

Appeal to the King in Council.

"And it is our further will and pleasure, and we do hereby direct, establish, and ordain, That if any person or persons shall find him, her, or themselves aggrieved, by any Judgment or determination of the said Supreme Court of Judicature, at *Bombay*, in any case whatsoever, it shall and may be lawful for him, her or them to Appeal to us, our heirs or successors, in our or their Privy Council, in such manner, and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all Judgments or determinations made by the said Supreme Court of Judicature, at *Bombay*, in any civil cause, the party or parties against whom, or to whose immediate prejudice, the said Judgment or determination shall be or tend, may by his or their humble petition, to be preferred for that purpose

to impose. The Statute 7th & 8th *Vict.*, c. 69, also provides for the admission of Appeals from any judg-

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

to the said Court, pray leave to Appeal to us, our heirs or successors, in our or their Privy Council, stating in such petition the cause or causes of Appeal. And in case such leave to Appeal shall be prayed by the party or parties who is or are directed to pay any sum of money, or to perform any duty, the said Court shall, and is hereby empowered to award, that such determination or Judgment shall be carried into execution, or that sufficient security shall be given for the performance of the said Judgment or determination as shall be most expedient to real and substantial justice.

Security on such Appeal for costs and for performance of Judgment.

"Provided always, that where the said Court shall think fit to order the Judgment or determination to be executed, security shall be taken from the other party or parties for the due performance of such Judgment or Order, as we, our heirs or successors, shall think fit to make thereupon. And in all cases we will, and require, that security shall also be given to the satisfaction of the said Court, for the payment of all such costs as the said Supreme Court of Judicature, at *Bombay*, may think likely to be incurred by the said Appeal, and also for the performance of such Judgment or Order as we, our heirs or successors, shall think fit to give or make thereupon; and upon such Order or Orders of the said Court thereupon made being performed to their satisfaction, the said Court shall allow the Appeal, and the party or parties, so thinking him, her or themselves aggrieved, shall be at liberty to prefer and prosecute his, her or their Appeal to us, our heirs or successors, in our or their Privy Council, in such manner and form, and under such rules, as are observed in Appeals made to us from our plantations or Colonies, or from our Islands of *Guernsey, Jersey, Sark* or *Alderney*.

Court in such Appeal, to transmit a copy of all evidence and proceedings.

"And it is our further will and pleasure, and we do hereby direct and ordain, that in all such cases the said Supreme Court of Judicature, at *Bombay*, shall certify and transmit, under the Seal of the said Court, to us, our heirs or successors, in our or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees, and orders, had or made in such causes appealed, as far as the same have relation to the matter of Appeal.

In criminal suits the Court may allow or

"And it is our further will and pleasure, that in all indictments, informations, and criminal suits, and causes whatsoever, the said

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

ments, sentences, decrees, or orders, of any Court of Justice within any British colony or possession abroad, although such Court should not be a Court of Error, or a Court of Appeal, within such colony or possession. It is true that the *Bombay* Charter gives the Supreme Court the power to allow or deny Appeals, but the Crown has expressly reserved to itself the power to refuse or admit an Appeal, even though denied by the Supreme Court. It never could be meant that the Supreme Court should have the power of saying, peremptorily, that its decisions, in criminal matters, should not be reversed, which it would in effect do, by refusing leave to Appeal. Such Appeal is an incident to the powers of this Court, which stands in relation to Colonial Courts, as the Queen's Bench does to the inferior Courts in this country. In *Re Ames* (*a*), leave was granted here to Appeal from a criminal proceeding in *Jersey*, which being found to be contrary to an express Ordinance in force in *Jersey*,

(*a*) 3 Moore's P. C. Cases, 409.

---

deny Appeal, and regulate the terms.

Supreme Court of Judicature, at *Bombay*, shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved, and also to award, order, and regulate the terms upon which Appeals shall be allowed in such cases in which the said Court may think fit to allow such Appeal.

Reservation of power to the King to refuse an Appeal.

"And we do hereby also reserve to ourself, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature, at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms, and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary such Judgment or determination, as to us or them shall seem meet."

such leave was afterwards rescinded. Mr. Baron *Parke*, in delivering judgment, says, "We are not disposed to say that we have not the power so to have done, as Her Majesty is the head of justice, and we are sitting here, not merely as a judicial body, but as Privy Councillors, and the matter of the former Petition was referred to us generally." So, here the matter is referred generally.—[The Right Hon. *T. Pemberton Leigh*: Is this merely a Petition for leave to Appeal?]—The Attorney-General: More than that is prayed for: the exercise of the Royal mercy; but your Lordships cannot advise on that part of the Petition. It could never have been intended to refer to your Lordships, sitting as the Judicial Committee of the Privy Council, an application to Her Majesty to grant a free pardon. —[The Right Hon. *T. Pemberton Leigh*: In the Petition of the States of *Guernsey* (*a*), referred by the Crown, to the Committee for the affairs of *Jersey*, the reference was larger than was intended, but we reported only upon the law of the case, namely, the legality of the acts done.]—Mr. *Hill*: Enough appears on the face of the Petition to authorize your Lordships to report to the Crown generally.—[The Right Hon. Dr. *Lushington*: Their Lordships are of opinion, that it was not intended by the reference, to refer to them any question, whether mercy should be extended by the Crown to the Petitioners; you will therefore confine yourself to two questions: first, whether there is any power in the Judicial Committee to advise Her Majesty to permit an Appeal; and, secondly, if they have such power, whether they would exercise a proper discretion in so advising.]—*Mr. Hill*: This is a Charter granted by the Crown, by virtue of

(*a*) 10th *Dec.* 1844.

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

the Statute 4 *Geo.* IV., c. 71; and if there were no reservation in the Charter to admit Appeals, not otherwise provided for, the power of the Crown to admit Appeals would not have been parted with; for the Crown has no power to denude itself of any prerogative necessary to the administration of justice. It has no more right to weaken its power to give protection to the subject, than the subject has to diminish or qualify his allegiance. The rights of the sovereign and the rights of the subject are strictly correlative. Nothing appears in the Charter to warrant a conclusion that an Appeal cannot lie here in a criminal proceeding. The Crown can only be bound by express words. If a question is reserved by a Judge upon the trial of a prisoner, for the opinion of the fifteen Judges, they advise the Crown, in their discretion, to grant a free pardon. Their powers are limited, as in this Court, to advise the Crown. Then why should not this Court advise a free pardon? Enough appears from the Petition to justify such an exercise of the prerogative.—[The Right Hon. *T. Pemberton Leigh*: Is there any instance in which we have dealt with evidence settled by the verdict of a jury, and considered whether it was well founded or not?]—The Court sat as a jury in *Cowas-jee* v. *Thompson* (*a*), and *Cowie* v. *Remfry* (*b*); and in *Gahan* v. *Lafitte* (*c*), though the verdict was sustained, yet the damages were cut down; this Court thereby exercising the highest discretion.—[The Right Hon. Dr. *Lushington*: Has any instance occurred where an Appeal has been granted by the Courts in *India* in the case of a felony?]—None. The only criminal cases

(*a*) *Ante*, p. 422. (*b*) *Ante*, p. 448.

(*c*) 3 Moore's P. C. Cases, 382; and see *Le Breton* v. *Ennis*, 4 Moore's P. C. Cases, 323.

appealed from *India* were *Pooneekooty Moodeliar* v. *The King*, and *Aga Mahomed Kurboolie* v. *The Queen*, which were indictments for misdemeanors.

The Attorney-General (Sir *F. Thesiger*), and Mr. *Wigram*, Q.C., for the Crown, and the East India Company.

It is contrary to the policy of the Criminal Law in *England*, to allow an Appeal in cases of felony, and nothing can be found in the Charter of *Bombay* which gives such power. No mention is made of criminal suit or information in the reservation to the Crown to refuse or admit an Appeal. If a party here is improperly convicted, the only redress that can be had, is by application to the Crown for a pardon. Even with regard to a question of law that may arise upon the trial, the prisoner has no right of appealing to the fifteen Judges; it can only be done by the Judge who presides at the trial, reserving the point. If then there exists no right of Appeal in criminal cases in *England*, it must follow, that none is given by this Charter to *Bombay*, where the English law prevails. The case of *Re Ames* establishes, that no Appeal lies from a criminal proceeding in *Jersey*. *Pooneekooty Moodeliar* v. *The King* was an indictment for forgery, which was a misdemeanor, by Statute in *India*; and in *Aga Mahomed Kurboolie* v. *The Queen*, the Appeal here was strictly confined to a question of law. In each of these cases, the Supreme Court had granted, under the Charter, leave to Appeal; here they refused it, and their refusal is by the terms of the Charter absolute. It would be most mischievous to grant this application, the object being to Appeal from a conviction for felony.

1846.

THE QUEEN v. EDULJEE BYRAMJEE.

The Right Hon. Dr. LUSHINGTON:

26th June 1847.

In the month of *August*, in the year 1844, eighteen natives of *Bombay* were tried before the Chief Justice, assisted by a Puisne Judge. One of the prisoners, *Burjorjee Jamsetjee*, was charged with the wilful murder of a *Parsee*, named *Muncherjee Hormusjee*. He was found guilty, and executed. The seventeen other prisoners were charged as accessories to the murder, and were convicted and transported.

Two petitions, one signed by one of the individuals convicted, and another respectably and numerously signed by certain inhabitants of *Bombay*, were presented to Her Majesty. Those petitions set forth at great length, the circumstances attendant upon the trial, and prayed for the exercise of Her Majesty's prerogative in favour of the convicts, or that an Appeal might be allowed. Her Majesty has been pleased to refer the petitions above mentioned to us, not for the purpose of advising as to the exercise of Her prerogative of mercy, but as containing, together with the affidavits in support of them, a full statement of all the facts, and for the purpose of enabling us to advise, whether the persons convicted can be permitted to Appeal, under the circumstances set forth in those affidavits and those petitions, from the sentence of the Court.

Those petitions did not allege that any error appeared on the face of the record, but they complained of the direction of the Judge, the evidence, and the verdict.

Now if this question were to be decided by the law of *England*, it is notorious, that no prisoner convicted of felony could claim a new trial or a right of Appeal in this sense. A writ of error is another question,

which it is not necessary for us to discuss in this case. The usual practice, where the Judgment is not postponed, is, if any objection be taken at the trial, which the Judge who tries the prisoners does not admit to be valid, but deems worthy of consideration, to reserve it for the opinion of the fifteen Judges. If the majority think the objection ought to have been sustained, the Judge who tried the prisoner reports to the Secretary of State, and the prerogative of the Crown is exercised in such a manner as the advisers of the Crown think meet. The prisoner has no legal right, in the proper sense of the term, to demand a re-consideration by a Court of Law of the verdict, or of any legal objection raised at the trial. Then if this be so by the law of *England*, if the trial had taken place here, the question to be considered is, whether the prisoners, being natives of *Bombay*, and British subjects, and the offence being committed and tried there, have, by the law prevailing at *Bombay*, any other, and what right.

It appears from the Charter of *Bombay*, which was granted under the authority of an Act of Parliament, that the Supreme Court was constituted a Court of Oyer and Terminer, and Gaol delivery, to administer Criminal Justice in such or the like manner, or form, or as nearly as the condition and circumstances of the place and person will admit, as our Courts of Oyer and Terminer, and Gaol delivery, may or do in *England*, due attention being had to the religion, manners, and usages of the native inhabitants. So far it would seem that the same law would be applicable to convictions for felonies, whether tried in *England* or *Bombay*, and consequently, the Petitioners would have no legal right to an Appeal or re-hearing.

In the Charter, however, will be found several im-

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

portant clauses touching Appeals, which require great attention, and more especially that clause which relates particularly to criminal cases. It is in the words following: "And it is our further will and pleasure, that in all indictments, informations and criminal suits and causes whatsoever, the said Supreme Court of Judicature at *Bombay* shall have full and absolute power and authority, to allow or deny the Appeal of a party pretending to be aggrieved, and also to award, order and regulate the terms upon which the Appeal shall be allowed in such cases in which the said Court may think fit to allow such Appeal." Now, however extensive the right of Appeal in criminal cases may be, the Supreme Court has full and absolute power and authority to allow or deny that Appeal. Presuming, therefore, for the present, that the words of this clause would sanction the granting of an Appeal of whatsoever kind in cases of felony, application for leave to Appeal was made to the Supreme Court, and was by that Court refused. If an Appeal then can now be granted, it must be on other grounds than the clause in the Charter; for according to the clause already cited, the rejection of the application to Appeal in the Supreme Court must be considered final.

This brings us to the consideration of the clause which immediately follows, and which is in the following terms: "And we do hereby also reserve to ourselves, our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by the Judgment or determination of the Supreme Court of Judicature at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions and regulations as we or

they shall think fit, and to reform, correct or vary such Judgment or determination as to us or them shall seem meet."

The first question which arises upon this clause is one of considerable importance, and it is this, whether it applies at all to the preceding clause, or, in other words, whether the Crown has reserved to itself, by force of the latter clause, the right of Appeal in criminal cases, including of course felonies—for there is no express limitation. Of the power of the Crown to create or reserve such right there can be no doubt, because the Act of Parliament enables the Crown to grant such a Charter for the administration of justice in *Bombay*, as it may think fit. But in considering whether the Crown has done so or not, it is not unimportant to remember that not only in *England*, but throughout the dominions of the Crown of *Great Britain*, governed by the law of *England*, no right of Appeal in felonies has ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to Appeal in any such case.

Under such circumstances, we think that it is not probable that the Crown in granting this Charter intended to make so extraordinary a deviation from the ordinary practice, and we are the more strongly inclined to this opinion from a consideration of the consequences which must inevitably follow. Where persons charged with the commission of felonies have been convicted, it is natural that they should resort to every possible means to escape from the penalty of the law, or to put off to the latest moment the execution of the sentence. Consequently, it is to be expected, that applications in almost every case for

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

leave to Appeal, (supposing by Appeal is meant a new trial, or an entire re-hearing,) would be made to the Supreme Court. As that Court is sitting upon the spot, no great delay or mischief might follow from the postponement of the execution of the sentence, till that application was heard and disposed of. But if the Crown has really, by this Charter, reserved to itself the right of granting an Appeal in such cases, what are the inevitable consequences? To cause execution to be done, would be, in effect, to prevent the right of granting an Appeal vested in the Crown, and to take away from the prisoner convicted, the right of laying his case before his sovereign, and of obtaining a re-consideration of it. For it must be remembered, that if a re-consideration, by way of Appeal, be reserved to the Crown, the right of applying for it must be reserved also. But if this were really the state of the law, we doubt whether any Court or any authority would think itself justified in ordering execution to be done, till there had been an opportunity given to the prisoner, of applying to the Crown, for a re-consideration of the case, according to the right reserved to the Crown, and the prisoner. Many very evil consequences must necessarily follow from this state of things. A long period must elapse before an application to the Crown could be made, and its decision could be known. And eventually, where the leave to Appeal was refused (and it must be presumed that this would generally be the case), execution would follow the sentence after so long an interval, that all benefit to be expected from a public example would be lost; and to this it may be added, that in a great majority of cases the convicts themselves would be kept in a state of miserable suspense,

to suffer in the end the same ignominious death to which they were sentenced.

For all these reasons, and especially because the reservation of the right of granting an Appeal would be to create an anomaly, unknown where the law of *England* prevails, we think the strong probability is, that the clause reserving to the Crown the right of granting an Appeal after refusal by the Supreme Court, was not intended to apply to cases of felony.

However powerful this reasoning may be to our minds, we still, however, fully admit that if such be the clear and undoubted meaning of the Charter, we must give effect to its provisions, however injurious we may conceive the consequences to be. To ascertain the meaning of this clause, we must look at the whole Charter, at what precedes and at what succeeds, and not merely at the clause itself.

It is first to be observed that the clause in question does not contain one of the words used in the preceding clause by which criminal cases were designated. There is not one word of "indictments, informations, or criminal suits." There is no expression directly referring to, and subjecting to further Appeal, the full and absolute power of allowing or denying Appeals in criminal cases conferred upon the Supreme Court. And yet if such had been the intention of the Charter, it would be natural to suppose that when such a power had been given to the Supreme Court in such very strong terms, the right of reviewing their decisions, if it were intended to be reserved, would have been expressed in language directly noticing the absolute power just before given, and in terms admitting of no doubt, establishing a control over that, as regards which, *primâ facie*, by the plain meaning of

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

the words, they were not to be subjected to any control or revision whatever. We do not find in this reserving clause, that which we should have expected to find if it applied to the preceding one, but we do find that from the commencement to the end, it is peculiarly applicable to civil cases, and that every expression in it may be satisfied by confining it to civil cases only.

In the clause of which the abstract in the margin is "Appeal to King in Council," it is directed that "any person aggrieved by the Judgment or determination of the Supreme Court in any case whatever, may Appeal to the Crown or to the Privy Council, in the manner and under the restrictions and qualifications" mentioned. The parties aggrieved are to petition the Supreme Court, which Court is empowered to award that such Judgment or determination shall be carried into execution, or sufficient security given for the performance of it. Various other regulations are added, which being complied with, the Supreme Court is bound to allow an Appeal, and the parties are permitted to prosecute it in the same manner as Appeals from the colonies. The clause now commented on is clearly confined to civil cases only. Upon comparing it with the reserving clause, we find that the matter over which the power of the Crown to grant Appeals is reserved, is expressed and described by the very terms which are used with respect to Appeals in civil cases. We are inclined, therefore, to hold that as the reserving clause is fully satisfied by confining it to civil cases, that construction is conformable with the general usage where the English law prevails.

In the preceding clause in this Charter, the Court of Oyer and Terminer is authorised to suspend the exe-

cution of any capital offence until the pleasure of the Crown be known, where there shall appear, in the judgment of the Court, proper occasion for the exercise of mercy. If the power of granting an Appeal in capital cases was reserved to the Crown, and consequently the right of applying for it, notwithstanding the refusal of an Appeal by the Court, would not it have been almost necessary to have given the Court, in such case, a power to suspend the execution of its sentence, if not to the criminal a right to require such suspension, till he might avail himself of his reserved right to apply to the Crown, not for mercy, but by way of Appeal? But we find no such power given.

For these reasons, if in this case it were necessary to support the advice we intend to give to Her Majesty, upon the ground that the reserving clause does not extend to Appeals in capital cases, we should be disposed to come to that conclusion. If, however, we should have formed an erroneous opinion in this respect, we think, upon the supposition that the reserving clause does extend to felonies, that we should not advise Her Majesty to allow this Appeal. We conceive a power to grant an Appeal is confined by the words of the clause to a "Judgment or determination" of the Supreme Court; and that all, even in this view of the case, which could be done, would be to allow an Appeal for the purpose of ascertaining whether the "Judgment or determination" of the Court was erroneous in point of law with reference to the indictment, or, in other words, whether there was error upon the face of the record, as in *England*. We do not think that by any construction the Crown can grant an Appeal as to the verdict itself. We conceive that we could not go over again the merits of the case. That we have not,

1846.
THE QUEEN v. EDULJEE BYRAMJEE.

and could not have, any materials for such an investigation. And that to presume that it was intended that a new trial should take place, is unwarranted by the words of the Charter, and would be an anomaly in the legal proceedings of this country. The present application is not against the "Judgment or determination" of the Court, but it is an application against what was done on the trial, and against the verdict.

It may be argued that the Crown could not, even by Charter, part with its prerogative. But it must be recollected that this is a case in which the Crown grants a Charter by virtue of an Act of Parliament, and that Charter, we conceive, must be considered as granted in the execution of the powers which were granted by that Act of Parliament.

A very similar case occurred upon a former occasion, though not with respect to a criminal cause. I mean the case of *Cuvilier* v. *Aylwin* [which is reported 2 Knapp, p. 72], and which is to the following effect: The very same argument which was used by Mr. *Hill* was used by Mr. Justice *Coltman*, who was then Counsel for the Petitioner. It was this:—"An Act of the Parliament of *Great Britain* declared that all laws passed by the Legislature of *Canada* should be valid and binding within the colony, and directed, that the Colonial Court of Appeal should be subjected to such Appeal, as it was previous to the passing of the Act, and also to such further and other provisions, as might be made in that behalf by any Act of the Colonial Legislature:—Held, that an Act having been passed by the Colonial Legislature limiting the right of Appeal to causes where the sum in dispute was not less than £500 sterling, a petition for leave to Appeal, in a cause where the sum was of less amount, could not be re-

ceived by the King in Council, although there was a special saving in the Colonial Act of the rights and prerogatives of the Crown."

In that case the Judgment was given in but few words. The Counsel for the Respondent was not heard, but it was observed, "It is not necessary to hear Counsel on the other side. The King has not power to deprive the subject of any of his rights, but the King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects in any of the countries under his dominions of any of his rights. This Petition must thereupon be dismissed."

It was therefore held, that though there was a reservation of the right of the Crown, yet as the Act in *Canada* was made in pursuance of an Act of Parliament of *Great Britain*, the powers contained in that Act did take away the prerogative of the Crown. So we apprehend this Charter in *India* being granted in pursuance of an Act of Parliament here, if by the true construction of the Charter the prerogative of the Crown is in any way limited, it must be said to be limited, not by the Act of the Crown itself, but by the Act of the Crown acting under the authority of Parliament.

It is for these reasons that their Lordships are of opinion (and perhaps other reasons might be given arising from a consideration of the peculiar circumstances of the case), that they must humbly advise Her Majesty, that the prayer of the Petition cannot be granted.

THE QUEEN, on the Prosecution of the BOMBAY GOVERNMENT,

AGAINST

SAMUEL STEPHENSON, ALLOO PAROO, and Others:*

On Petition from the Supreme Court of Judicature at Bombay.

23rd June 1847.

Under the *Bombay* Charter of Justice, the Supreme Court at *Bombay* is invested with full and absolute power to allow or deny an Appeal in criminal cases, and no power is reserved to the Crown by such Charter to grant leave to appeal in such cases.

The case of *Christian* v. *Corren* (1 P. Williams, 329) observed upon.

THIS was a Petition for leave to Appeal from a Judgment of the Supreme Court of Judicature at *Bombay*, whereby the Petitioner, *Alloo Paroo*, and two others, were found guilty of felony, as accessories before the fact, to the burning of a ship, called the *Belvidere*. The indictment was preferred in the Supreme Court against *Samuel Stephenson*, for feloniously burning the ship, and the Petitioner and two others for aiding and abetting in the said felony before the fact. The trial of the Petitioner and two others as accessories (*Stephenson* not having been arrested) took place before Sir *H. Roper*, Chief Justice, and Sir *E. Perry*, Puisne Judge, at an Admiralty Session of the Supreme Court, when they were found guilty, and sentenced to transportation for life. Shortly after this conviction, the Petitioner presented a Petition to the Supreme Court, praying for leave to Appeal to Her Majesty in Council against the

* This and the preceding case, being decisions upon the same point, it is thought advisable to place them together.

Present: Members of the *Judicial Committee*,—Lord Brougham, Lord Langdale, the Right Hon. Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

Privy Councillors,—*Assessors*,—Sir A. Johnston, and Sir E. Ryan.

trial, conviction, judgment, and sentence, upon various grounds, the principal of which was an objection, taken upon his arraignment by Counsel on his behalf, that under the Criminal and Statute Law existing in *Bombay*, he could not legally be tried upon an indictment, as an accessory before the fact, in the absence of, and until after the trial and conviction of, the party charged as principal, which, however, the Court overruled, and refused to grant leave to Appeal. The Petition set forth the indictment and proceedings on the trial, and prayed that Her Majesty would, by and with the advice of the Privy Council, make such Order as should seem fitting for the admission and prosecution of an Appeal from the Judgment of the Supreme Court, and for the production of true and exact copies of the indictment, and of all evidence, proceedings, judgments, decrees, and orders, given, had, or made, in the prosecution in the Supreme Court, and of the Judges' notes of the evidence, and of the reasons given by the Judges at the trial, and their refusal to allow leave to appeal against the conviction and judgment.

Mr. *Hill*, Q. C., Mr. *Robinson*, Sir *John Bayley*, and Mr. *Accroyd*, in support of the Petition,

Cited the cases of *Pooneekooty Moodeliar* v. *The King* (*a*), *Aga Mahomed Kurboolie* v. *The Queen* (*b*), *In re Ames* (*c*), *D'Orliac* v. *D'Orliac* (*d*), *Hulm* v. *Hulm* (*e*), *Christian* v. *Corren* (*f*), *Rex* v. *Moreley* (*g*), and the Charter of *Bombay* of the 8th *December* 1823 (*h*).

(*a*) 3 Knapp's P. C. Cases, 348.
(*b*) 4 Moore's P. C. Cases, 239.
(*c*) 3 Moore's P. C. Cases, 409.
(*d*) 4 Moore's P. C. Cases, 374.
(*e*) 4 Moore's P. C. Cases, 262.
(*f*) 1 P. Williams, 329.
(*g*) 2 Burr. 1041.
(*h*) *Ante*, 471, 2, 3, 4.

1847.
THE QUEEN
v.
ALLOOPAROO.

Mr. *Wigram*, Q.C., and Mr. *Forsyth*, on the part of the East India Company, opposed the Petition.

Lord BROUGHAM:

26th June 1847.

This case, to a certain degree, resembles the case which has been already spoken to. But in one material respect, no doubt, it may be said to differ from it, because I do not understand it to have been argued at the Bar, in *Alloo Paroo's* case, that there lay an Appeal from the verdict of a jury, for the purpose of obtaining a new trial. I understand the question raised there was, (at least it appears to me perfectly hopeless to argue any other point,) that a Writ of Error lay, or a proceeding in the nature of a Writ of Error, for some defect of law or jurisdiction appearing upon the record. Be that as it may, however, their Lordships are of opinion, that taking the terms of the Charter into consideration, and having regard to the origin of that Charter, namely, that it was not a mere act of the Crown, by force of the prerogative, but in execution of a power conferred upon the Crown, by Statute; the Charter, by its terms in execution of that Statute, does not reserve a power to the King in Council, of reviewing a determination of the Court below, in a criminal case, the Court below having denied the application for such a review.

That this is in execution of a statutory power, is clear. A Statute was made, in the 4th year of the late King, *George* IV., which gave the Crown the power to grant a Charter to a Court of Justice in *Bombay*, with the same powers, immunities, jurisdiction and authority, as were vested in the Court at *Fort William*, by virtue of another statutory power,

granting that Charter, namely, the 13th of *George* III., chap. 63.

That Statute contains a power to the Crown, to grant an Appeal, in such manner, and in such cases, and on such security, as to the Crown shall seem meet. Then, when we look at the Charter granted in execution of that power, constituting the Supreme Court at *Fort William*; bearing in mind that, by the 4th of *Geo.* IV., c. 71, the Court in *Bombay* is to be a model of that Court, we find there that the reservation, after the grant of Appeal, is in the same terms with the section brought in question now before us, as to *Bombay*, respecting criminal cases;—that the reservation, which follows the section touching Appeals in criminal cases, is confined strictly to civil cases.

Some doubt might have arisen upon the section in the *Bombay* Charter, following the section upon criminal cases. Some doubt might have arisen from the frame and structure of that section, whether it were confined to civil cases or not; for that part which clearly confines it to civil cases, limiting the sum appealed from to 3,000 *Bombay* rupees, is in a separate proviso, and follows, after an interval, from the first, and reserving part of the section, that interval being filled up by the power given to the Court to execute judgments and orders. But when we look at the *Fort William* Charter, which is to be the foundation and model of this Charter, we find, that no doubt whatever exists there, that the reserved power refers to civil cases, for it is part and parcel of that section, reserving the power to the King in Council, that it shall not exceed the sum of 1,000 rupees.

1847.
THE QUEEN v. ALLOOPAROO.

The section itself, if it had stood alone, without that reserved power, appears to us clearly to vest an absolute discretion in the Court below, in which the Judgment is had; to refuse, as well as to grant, the Appeal: for it is said, that in "all indictments, informations, and criminal suits and causes whatever," which are large words certainly, "the said Supreme Court of Judicature shall have the full and absolute power and authority, to allow or deny the Appeal of the party, and also to order and regulate the terms upon which the Appeal shall be allowed, in such cases in which the said Court may think fit to allow such Appeal."

Now, first of all, arises upon this, the obvious consideration from the words, that it seems impossible to give a discretionary power, of either allowing or denying, in more clear and plain terms, than these terms are, "full and absolute power to allow or deny." And then, that is followed by saying that the terms may be regulated by the Court "in cases in which the said Court may think fit to allow such Appeal," being a very ordinary expression used in Acts of Parliament, when it is intended that a power given to any officer or any body for public purposes, shall not be absolute and compulsory upon that individual officer, or that body, but shall be discretionary in that individual officer or body, to exercise or not, as he or they shall please, and be advised. If the words are "It shall and may" be so and so done, by such and such officer and body, then the word "may" is held in all soundness of construction to confer a power, but the word "shall" is held to make that power, or the exercise of that power, compulsory; cases are not wanting where, even without the use of so stringent a word as "shall," it has

been held that a power so conveyed must be executed. But where it is intended not to compel, but to leave it optional with the parties, the words "think fit" are the very ordinary technical and appointed words, to show that the power is not compulsory. And those words occurring in this clause, they seem really to leave no reasonable doubt, that a discretion is vested in the Court below, of denying as well as of allowing an Appeal.

This is still further clear when we come to look at other Charters, in which it is not intended to give the power absolutely, but in which it is intended that the Court shall be, to a certain degree, *quasi* ministerial in granting leave to Appeal. For in all those cases, if we look to them, we shall find that this is the course adopted by the Charter. The party is to appeal to the King in Council. He is first, before appealing, to petition the Court, of whose sentence he complains, and then it is (this is the course in almost all cases, I know of no exception), that the party has the right to Appeal. In order to prosecute his Appeal, he must first petition the Court for leave; if the Court shall grant leave to Appeal, they are then to prescribe certain terms, as in the case of a Judgment; he is to give a certain security, and in some cases security must be given for the costs; but in none of those cases do we find anything like this other alternative, "in case the Court shall refuse leave to Appeal," because it is not intended to oust the party, of his privilege to apply here, even in the case of the Court having refused to comply with his petition. The words, "if they shall think fit," are never inserted there. This is a totally different clause, differently framed, and with another and entirely different object. The cases which have

1847.
THE QUEEN v. ALLOOPAROO.

been cited, have been already partly disposed of, by what has been said by their Lordships in the last case. The case of *Christian* v. *Corren*, from the *Isle of Man*, in *Peere Williams*, really proves nothing. The argument is the argument of Mr. *Peere Williams* himself, for it is not the Judgment of the Court. No doubt *Peere Williams* is a great authority as a reporter, a very learned person, and I believe a very accurate reporter, he is generally allowed to be; but what he says there, is no part of the Judgment of the Court. He says, even if there be express words in the Charter, excluding the right of the subject, those words shall not be held to deprive the subject of his common law right of Appeal to the Crown, in order that justice may not fail. The Court, which was assisted in that case by Lord Chief Justice *Parker*, in giving their Judgment, proceed upon no such ground. They only say, in this case there is nothing to take away the general right of Appeal, which is necessary to prevent a failure of justice. And Lord Chief Justice *Parker*, in that case, observes that the Court of Chancery, even in the case of a proceeding of a Copyhold Court, if anything were done against good conscience, would review it, and would direct that the Court should re-assemble, for the purpose of acting more conscientiously. But it is certain, that that case was not borne out by the judgment of the Court of Chancery, when an attempt was made in a case before Lord *Jeffries*, Lord Chancellor; which had been very much considered at the Rolls by Mr. Serjeant *Trevor*, who was then Master of the Rolls, and where such a power to interfere was wholly denied. *Ash* v. *Rogle* (1 Vern. 367).

It is quite unnecessary, however, to enter into that,

because it is quite sufficient to observe, that the Lord Chief Justice, in granting that right of Appeal which has been contended against, does not in the slightest degree bear out the generality of Mr. *Peere Williams's* argument.

But even if the argument of Mr. *Peere Williams* had been entirely confirmed and adopted by the Court, it does not apply to this case. Because there is no question here of the power of the Crown to abandon the prerogative. The Crown may abandon a prerogative, however high and essential to public justice, and valuable to the subject, if it is authorized by Statute to abandon it; and here it is in the execution of a power conferred by Statute, that this abandonment, if any abandonment has been made, has taken place.

It must be observed, likewise, that there is no abandonment of the right of a subject to Appeal to the King in Council; for there is an express provision made as to the manner in which that Appeal shall be exercised, and for the Crown having the power. It might be reasonably contended that the Crown may point out the manner in which the general common law right of Appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to Appeal to the Crown generally. That Appeal shall be in civil cases at all times, but that Appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below, the right (the Crown may say) to refuse or to grant it, as they see fit. I see nothing contrary to the prerogative. I see nothing contrary to the right of the subject, as involved in the exercise of that prerogative of the Crown, having even independently of the Statute,

1847.
THE QUEEN v. ALLOOPAROO.

laid down the right in that particular form; but that is wholly unnecessary in this case, and I throw it out only to meet the argument in *Peere Williams*, and not the argument here, which is quite another case, and rests upon other grounds. It is wholly unnecessary to deal with that abstract at all for our present purposes, because this is the case of the execution of a power granted by Statute, to which undoubtedly the case of *Cuvillier* v. *Aylwin* would almost in terms apply.

Their Lordships, therefore, are of opinion, that, in this case, even if the argument were confined to the matter of error appearing upon the record, there is no ground whatever for holding, that the Crown has reserved its power of receiving an application of this kind against the decision of the Court below, and that the Court below alone has the power of granting or refusing an Appeal in such cases.

It is unnecessary of course to argue the question of an application for a new trial or for a re-consideration of the whole case, because that is still more clear. But clear enough it is, even if the question were confined to a mere error upon the record.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME

ACCOUNT

See "LEASE"
"PARTIES"
"SALES," 1

ACTION

1 Claim by the *Swami*, or chief priest of the *Smartava* sect of Brahmins, in *Bombay*, to the exclusive right of *adavi palki*,—being carried cross-wise in a palanquin, on ceremonial occasions,—in virtue of a grant from the ruling power to a predecessor in office

Whether an action is maintainable by the law of *Bombay*, in the Civil Courts, by the grantee of such a dignity against a party who assumes the like privilege *Quære?* [*Sri Sunkur Bharti Swami* v *Sidha Lingayah Charanti*] - - - - 198

2 *Quære*—Whether the Civil Courts in *India* have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right to perform, or have performed, any religious ceremonies [*Namboory Setapaty* v *Kanoo-Colanoo Pullia*] 359

See "LEASE"

ADOPTION

A childless Hindoo, by Deed, directed his wife to adopt a child After his death, his widow brought a suit for a partition, and to be put in possession of her husband's share, in the joint undivided estate Pending the suit, she adopted a son By the Hindoo law, the act of adoption divested the property from the widow, and vested it in the adopted son, subject to the maintenance of the widow. Notwithstanding the adoption, the suit was prose-

cuted in the widow's name, and a Decree made, directing her to be put in possession.

Held, in such circumstances, that she prosecuted the suit as the guardian of the adopted son, and was put into possession as his trustee, and accountable to him for the profits of the property so decreed to her. [*Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah*] - - 229

ADVERSE POSSESSION.

See "LIMITATION."

APPEAL.

1. Leave to appeal granted, on payment of costs, from an Order of the *Sudder* Court at *Bombay*, decreeing interest upon the amount awarded by the Judgment of the Court; the Appellant having failed to apply to the Court in *India* within six months, as required by the Order in Council of the 10th *April* 1838. [*Kirkland* v. *Modee Peston-jee Khoorsed-jee*] - - 220

2. Whether the rules of the Ecclesiastical Courts in Doctors' Commons relating to the doctrine of pre-emption of Appeal, apply to an Ecclesiastical caust in the Supreme Court at *Calcutta*, so as to deprive a party of the Charter right to appeal within six months from the decree, &c. *Quære?* [*Casement* v. *Fulton*] - - - - - - - 395

3. The *Bombay* Charter of the 8th *Dec.* 1823, (granted in pursuance of the powers conferred to the Crown by 4 *Geo.* IV., c. 71,) after providing "That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at *Bombay* shall have the full and absolute power and authority to allow or deny the Appeal of the party pretending to be aggrieved," proceeds thus:—"And we do hereby also reserve to ourself, our heirs, and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a Judgment or determination of the Supreme Court of Judicature at *Bombay*, to refuse or admit his, her or their Appeal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary, such Judgment or determination as to us or them shall seem meet."

Upon a Petition, praying for leave to appeal from a conviction for felony; held by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the Charter, to allow Appeals in criminal cases, such Appeal being confined to civil cases only.

Held also, that the Charter having been granted by the Crown, by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: and that the Supreme Court alone

has full and absolute power to allow or deny permission to appeal in criminal cases.

Semble. No Appeal lies, in cases of felony, to the Queen in Council, from any of the dominions of the Crown of *Great Britain*, which are governed by the law of *England*. [*The Queen* v. *Eduljee Byramjee*] 468

4. Under the *Bombay* Charter of Justice, the Supreme Court at *Bombay* is invested with full and absolute power, to allow or deny an Appeal in criminal cases, and no power is reserved to the Crown by such Charter to grant leave to appeal in such cases.

The case of *Christian* v. *Corren* (1 P. Williams, 329) observed upon. [*The Queen* v. *Alloo Paroo*] - 488

APPROPRIATION.

See "SALES," 1.

ASSIGNMENT.

An assignment by a Puisne Judge of the Supreme Court at *Madras*, of the sum "equal to the amount of six months' salary," directed by the 6 *Geo.* IV., c. 85, to be paid to the "legal personal representatives" of such Judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge; and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 & 6 *Edw.* III., c 16, and 49 *Geo.* III., c. 126., and, therefore, contrary to public policy. [*Arbuthnot* v. *Norton*] - - 435

AWARD.

An award made by a *Punchayet*, settling a disputed boundary to land forming an island, claimed by the inhabitants on the respective banks of the river, under circumstances, set aside, as having been made contrary to the provisions of *Bombay* Regulation VII. of 1827.

The decision of the Sub-Collector, appointed by the Government to settle the boundary, annulling the award of the *Punchayet*, and assigning a boundary, confirmed on appeal. [*The Mokuddims of Kunkunwaddy* v. *The Enamdar Brahmins of Soorpal* - - - - - - 383

BENGAL CHARTER.

See "APPEAL," 2.

BENGAL REGULATIONS.

See "LIMITATIONS."
"SALE."

BOMBAY CHARTER.

See "APPEAL," 3, 4.

BOMBAY HIGHWAY-RATE.

See "HIGHWAY RATE."

BOMBAY REGULATIONS.

See "AWARD."
"LIMITATION."

BOUGHT AND SOLD NOTES.

C. & Co. and *H.* & Co. were merchants at *Calcutta*. *H.* & Co. sold to *C.* & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to *H.* & Co., and submitted it to *H.* for his approval, when *H.* having objected to a particular word remaining, the broker took the sold note to *C.*, and informed him of *H.*'s objection. *C.* struck his pen through the word objected to by *H.*, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to *H.* & Co. The broker delivered to *C.* & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by *H.* & Co. against *C.* & Co. for non-performance of the contract contained in the sold note, the Supreme Court at *Calcutta* was of opinion, that the sold note alone formed the contract, and found for the Plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending *C.*'s alteration of the sold note, and affixing his initials, were not sufficient to make that note alone a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. [*Cowie* v. *Remfry*] - - - - - - - - 448

BOUNDARY.

See "AWARD."

CASTE.

Suit by certain *Comaties* of the *Vaisyas*, or third caste of the Hindoos, against the *Mantrimaha-nad* (secret assembly, for avenging encroachments upon rules or rights of caste), to establish their right to have performed for them and their tribe, certain religious ceremonies, called *soobha* and *asoobha* (auspicious and inauspicious), by *Brahmins* in the language of the *Vedas*, in the enjoyment of which they had been disturbed by the *Brahmins* refusing to perform such ceremonies. In the answer to the plaint, the Defendants denied the right of the *Comaties*, and set forth certain acts, whereby they had forfeited their right to have the ceremonies performed for them, by the *Brahmins*. The *Zilla* Court, taking that part of the Defendants' answer, which set forth the acts by which the forfeiture of the rights in question was occasioned, framed it into a statement of facts and law, for the opinion of the *Pundit* of the Court;

and upon his opinion, declared the Plaintiff's tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon appeal, the Provincial Court remitted the suit to the *Zilla* Court, to take evidence, and upon such evidence, and the opinions of the *Pundits*, which the Provincial Court took upon the same statement as the *Zilla*, they affirmed the Decree. The *Sudder Dewanny Adawlut*, upon the whole case, reversed these decisions. Held by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular, and contrary to the express provisions of the *Madras* Regulation XV. of 1816, sec. x., cl. 3 & 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit. [*Namboory Setapaty* v. *Kanoo-Colanoo Pullia*] - - - - - - - - 359

See "ACTION."

CHARTER.

See "APPEAL," 2, 3, 4.

COPARCENARY.

The presumption of law is, that the whole of the property of an undivided Hindoo family is in coparcenary.

The *onus* lies on a member of such family to prove that it was separately acquired. [*Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah*] - - - - - - - - 229

CRIMINAL SENTENCE.

See "APPEAL," 3, 4.

DAMAGES.

See "LEASE."

DEED OF GIFT.

See "MAHOMEDAN LAW," 1.

DIVISION.

See "COPARCENARY."

ECCLESIASTICAL LAW.

See "APPEAL," 2.

EVIDENCE.

Debt on bond. The Defendant, by his answer, denied his execution of the bond. The Plaintiff, in his reply, stated the accidental destruction of the bond, and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be

GENERAL SECRETARIAT LIBRARY

produced. At the trial the Plaintiff produced the fragments, and, under sec. 11, *Madras* Reg. XVII. of 1802, put in as evidence a registered copy of the bond. He called no witnesses to prove that the fragments produced formed part of the original bond. The Court admitted the registered copy as evidence, and found for the Plaintiff. The Judicial Committee of the Privy Council, on appeal, reversed this finding, on the ground that the registered copy, in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. [*Syud Abbas Ali Khan* v. *Yadeem Ramy Reddy*] - - 156

EVIDENCE OF PAYMENT.

The statement in a Deed of Compromise, that the consideration money was paid, is not of itself, according to the practice of the native courts in *India*, conclusive evidence of such payment, and may be rebutted by evidence of non-payment.

Where payment is denied and evidence of non-payment produced, the burthen of proof that the money was paid, lies on the debtor. [*Chowdry Deby Persad* v. *Chowdry Dowlut Sing*] - - - - - 347

HIGHWAY RATE.

By Stat. 33 *Geo.* III., c. 52, s. 158, (for, among other things, making better provisions for the good order and Government of the towns of *Calcutta*, *Madras* and *Bombay*,) assessments are directed to be made on the owners or occupiers of houses, buildings and grounds, "according to the true and real annual values thereof."

Upon a rate made in pursuance of this Statute, the Quarter Sessions at *Bombay* assessed the annual value of a cotton pressing factory, having fixed machinery, upon the gross receipts, after making an allowance of ten per cent. for tenants' profits. Held by the Judicial Committee, reversing the Order of Confirmation of the Sessions, by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 & 7 *Wm.* IV., c. 96) that the building might reasonably be expected to be let for, to a yearly tenant. [*Fawcett* v. *The Justices of Bombay*] - - - - - - 408

HINDOO LAW.

See "ADOPTION."
"COPARCENARY."
"LEASE."

INDIAN WILL ACT.

See "WILL."

INHERITANCE.

See "MAHOMEDAN LAW."

INTEREST.

According to the practice of the Native Courts in *Bombay*, a sum found due for mesne profits, is a judgment debt, and carries interest by its own force.

On Petition in the Native Court, after Decree upon appeal in *England*, interest awarded on the amount of mesne profits decreed, although not prayed for in the plaint, or given by the Decrees in *India*, or the Order of affirmance in *England*. [*Kirkland* v. *Modee Peston-jee Khoorsed-jee*] - - - - - - - 220

JUDGE.

See "ASSIGNMENT."

JURISDICTION.

1. An inhabitant of *Benares*, trading at *Calcutta*, and having a house of business there, held to be subject to the jurisdiction of the Supreme Court. [*Baboo Janokey Doss* v. *Bindabun Doss*] - - - - - 175

2. This Court will not act as a Court of original jurisdiction. Therefore, Where the Judge of the Court below improperly suppressed documents which were not discovered until after the transmission of the Appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the case to the *Sudder Dewanny* Court, for consideration. [*Juveer-bhaee* v. *Vuruj-bhaee*] - - 324

3. *Quære*. Whether the Civil Courts in *India* have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right to perform, or have performed, any religious ceremonies. [*Namboory Setapatty* v. *Kanoo-Colanoo Pullia*] - - - - - - - - - 359

LEASE.

A lease for seven years of a farmed *pergunna* in *Bengal*, was granted by the *Raja* of *Burdwan*. The lease was not executed in writing, but the terms of holding were defined by a notice sent by the *Raja* to the tenants of the premises. The lessee died before the termination of the demised term, when the lessor evicted the lessee's representatives, and granted a fresh lease to another, at an increased rent. Held, in a suit brought by the representatives of the lessee to recover compensation for loss of profits, that the act of dispossession was wrongful, the remainder of the term by the Hindoo law surviving to the heirs and representatives of the deceased lessee; and damages to be paid by the lessor, calculated upon the increased rental, awarded. [*Maha-raja Tej Chund Bahadur* v. *Sri Kanth Ghose*] 261

LEGITIMACY.

See "MAHOMEDAN LAW."

LIMITATION.

1. The fact of residence at a distance of 900 miles from the place where the subject matter in dispute was situate: Held insufficient to bring a party within the exception of the *Bengal* Regulations of Limitation (III. of 1793 and II. of 1805 s. 3); the party in possession of the property being a purchaser for a valuable consideration without notice, and the Plaintiff's right of action having accrued twenty-five years before the institution of the suit. [*Sheikh Imdad Ali* v. *Mussumat Kootby Begum*] - - - 1

2. A claim preferred before the *Peishwa* in 1813, previous to the British rule, but upon which no adjudication was made: Held sufficient to bring the claimant within the exception of sec. 7, cl. 2, of the *Bombay* Reg. of Limitation V. 1827, notwithstanding adverse possession for thirty years previous to the institution of the suit. [*Jewa Jee* v. *Trimbuk-jee*] - - - - 138

MADRAS REGULATIONS.

See "CASTE."
"EVIDENCE."
"PLEADING."

MAHOMEDAN LAW.

1. By the Mahomedan Law, a child born in wedlock is presumed to be the child of the father; legitimacy following the marriage bed.

A Mahomedan, by deed, declared that he had adopted a son "who was to succeed to his property and title." Held on Appeal, to be inoperative and void, either as a deed of gift, or as a testamentary disposition, no delivery of possession and relinquishment by the donor, or seisin by the donee having taken place. [*Jeswunt Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee*] - 245

2. By the Mahomedan law, continual cohabitation and acknowledgment of parentage, is presumptive evidence of marriage and legitimacy. [*Khajah Hidayut Oollah* v. *Rai Jan Khanum*] - - - - - - - - 295

NEXT FRIEND.

See "OFFICER OF THE COURT."

ORDER IN COUNCIL (Appeal under).

See "PRACTICE," 3

——————— (Variation of).

See "PRACTICE," 5.

OFFICER OF THE COURT.

By a general Order made on the Equity side of the Supreme Court of *Madras*, it was ordered that "Whenever it shall appear, that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court, or a Judge, institute proceedings on behalf of such infant,

for the purpose of protecting his or her person or property." In pursuance of this Order, the Registrar of the Supreme Court, upon Petition, obtained an Order, giving him liberty to file a Bill in the Equity side of the Supreme Court, as the next friend, and on behalf of infants, for an account of the estate of their father, who died intestate, against their mother, the Administratrix; and notwithstanding an Appeal against such Order, such Bill was filed, to which the Defendant put in a plea, which being overruled, a further Appeal from such decision was interposed to Her Majesty in Council.

By the practice of the Supreme Court, the Registrar is entitled to a commission of 5 per cent. on all sums of money paid into Court.

Held by the Judicial Committee, that the Order of the Equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not under the Statute 2 & 3 *Vict.*, c. 34, was void, it being against public policy to allow an officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and the Orders made in pursuance thereof, reversed. [*Kerakoose* v. *Serle and others*] 329

PARTIES.

Decree for an account of dealings and transactions of a deceased partner in an Hindoo family bank, and for a dissolution of the partnership, reversed, on the ground that the respective rights of the parties were not sufficiently defined and declared, and that the Decree, under any circumstances, was erroneous, being made without the heir or legal representative of the deceased partner being a party to the suit. [*Baboo Janokey Doss* v. *Bindabun Doss*] 175

PARTNERSHIP, HINDOO.

See "PARTIES."

PLEADING.

In a suit for possession of a *semindary*, the Plaintiff's title depended upon the fact of a division having taken place between the family. No averment of such division was made in the plaint, nor did the Courts in *India*, as required by the *Madras* Regulation XV. of 1816, sec. 10, make it a point to be established, though some evidence was given of the fact. Held on appeal, that there had been a miscarriage, the conditions of the Regulation being imperative, and the Decree of the *Sudder Dewanny Adawlut* reversed.

But, as the parties had acted under a misapprehension of the Regulation, leave was given to institute a fresh suit within three years. [*Srimut Moottoo Vijaya Raghanadha Gowery Vallabha Perria Woodia Taver* v. *Runy Anga Moottoo Natchiar*] - - - - - - - - 278

See "CASTE."
"PARTIES."

PREROGATIVE OF THE CROWN.

See "APPEAL," 3, 4.

PRACTICE.

1. Evidence tendered to the *Sudder* Court, on a Petition for review, which was refused, and the order of refusal not appealed from, though forming part of the transcript, cannot be referred to in the argument upon the Appeal from the original Judgment. [*Sheikh Imdad Ali* v. *Mussumat Kootby Begum*] - 1

2. There being two sets of Appellants, having separate interests and adverse claims against each other, as well as against the Respondents, the Judicial Committee permitted two counsel to be heard for each set of Appellants. [*Jewa-jee* v. *Trimbuk-jee*] - - - - - - 138

3. Leave to Appeal granted, on payment of costs, from an Order of the *Sudder* Court at *Bombay*, decreeing interest upon the amount awarded by the Judgment of the Court; the Appellant having failed to apply to the Court in *India*, within six months, as required by the Order in Council of the 10th *April* 1838. [*Kirkland* v. *Moodee Peston-jee Khoorsed-jee*] - - - - - - 220

4. This Court will not entertain a technical objection which was not taken in the Court below, where it might have been amended. [*Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah*] - - - - 229

5. Under an order of reference, the Judicial Committee of the Privy Council, upon an Appeal coming before them, remitted the case, by reason of the rejection of certain evidence, to the Court below, with directions to take the evidence rejected. The Court in *India*, upon the remit, examined such of the witnesses before tendered as were produced, but made no adjudication in the cause, and transmitted the further evidence to *England*. No fresh order of reference was made to the Judicial Committee. Upon the Appeal, with the further evidence coming before them, their Lordships, under the circumstances, were of opinion that they had no jurisdiction to entertain the case, the original order of reference having been exhausted by the remit.

But upon a Special Petition for such purpose (all parties consenting) the Order in Council directing the remit to *India* was varied and amended, by being made a mere reference to the *Sudder Dewanny Adawlut* to take evidence, without throwing any duty upon that Court to reconsider or adjudicate upon the cause, but to remit the same, for the consideration of the Lords of the Committee. [*Jeswunt Sing-jee Ubby Sing-jee* v. *Jet Sing-jee Ubby Sing-jee*] - - - - - - - 245

6. This Court will not act as a Court of original jurisdiction. Therefore,

Where the Judge of the Court below improperly suppressed documents, which were not discovered until after the transmission of the Appeal to Her Majesty in Council, their Lordships refused to give an opinion on the merits, and remitted the cause to the *Sudder Dewanny* Court for reconsideration. [*Juveer-bhaee* v. *Vuruj-bhaee*] - 324

7. This Court will not encourage a

mere objection of form, that does not affect the substantial merits of the case. [*The Mokuddims of Kunkunwaddy* v. *The Enamdar Brahmins of Soorpal*] - - - - - - 383

PRINCIPAL AND SURETY.

A. drew five Bills in favour of B. on *Fergusson* & Co., who accepted the same, and got them discounted by the Bank of *Bengal*, and, on their becoming due, procured their renewal. *Fergusson* & Co. subsequently drew three Bills on the Bank of *Bengal*; and, for securing as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *Chili* copper, of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorised, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards, *Fergusson* & Co failed, and assignees of their estate and effects were appointed under the Indian Insolvent Act. On presentation to A. of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The assignees of *Fergusson* & Co. redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by *Fergusson* & Co. All the Bills drawn by A. were dishonoured, and the Bank of *Bengal* brought an action against A. for their amount. On a Bill filed by A., the Bank were restrained by Injunction from proceeding with the action at law. Held on Appeal by the Judicial Committee discharging the Injunction and reversing the Decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A. as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills. [*The Bank of Bengal* v. *Radakissen Mitter*] - - - 19

PRIVY COUNCIL.

See "JURISDICTION," 2.
"PRACTICE," 5, 6.

PUBLIC POLICY.

See "ASSIGNMENT."
"PUBLIC OFFICER."

REGULATIONS.
See "LIMITATION."
"PLEADING."
"SALE."

RELIGIOUS CEREMONIES.
See "CASTE."
"ACTION," 2.

REMAINDER OF TERM OF LEASE.
See "LEASE."

REPRESENTATIVES.
See "ASSIGNMENT."
"LEASE."

REVENUE.
See "SALES."

SALES.

1. A *talook*, consisting of 210 villages, but classed under the decennial settlement, for fiscal purposes, as 74 villages, and assessed as 74 separate *sudder jummas*, was sold by public auction by the Collector, in one lot, for arrears of Government revenue, at a sum greatly disproportionate to its value. The sale was made by order of the Board of Revenue, but it did not appear that the Collector had informed the Board that the *talook* consisted of 74 villages, or that the Board had authorized the sale in one specific lot. The Board subsequently confirmed the sale. The surplus of the purchase-money, after satisfying the Government arrears, was received and appropriated by the *Malguzar*. On a suit by the *Malguzar* against the purchasers, to annul the sale, it was held by the Judicial Committee affirming the Decree of the Court below:—

I. That the act of the Collector, in putting up for sale, and consolidating the 74 villages as one lot, without the express authority of the Board of Revenue for the sale of such specific lot, was contrary to the Regulations, and illegal, and was not cured by the general authority given previous to the sale, or by the subsequent confirmation thereof by the Board.

II. That the sale being unauthorized, no implied adoption by the subsequent appropriation of the purchase-money could bar the *Malguzar* from reclaiming the estate, on the restoration of the purchase-money.

III. That the retrospective operations of Reg. XI. 1822, did not apply to a sale so circumstanced as this; it being provided by clause 3 of sec. 6, that in order to prevent the sale being annulled, the Board of Revenue shall have actually given authority to proceed to the sale of the specific lot.

But the Courts in *India* having proceeded on the footing that the purchaser had been repaid, during the time he was in possession, by the perception of the rents and profits of the *Zemindary*, did not direct the *Malguzar* to refund the purchase-money, or call for an account of the mesne profits. Such part of the Decree of the Court be-

low reversed, and an account directed to be taken in *India*, of the rents and profits received by the purchaser, giving credit for permanent improvements on the estate; and as the purchasers were not responsible for the illegality of the sale, so much of the Decree of both Courts below, as condemned them in costs, reversed, and both parties ordered to pay their own costs, in the Courts in *India* and in this country. [*Maha-rajah Mitterjeet Sing* v. *The heirs of Ranee Juswunt Sing*] - - - - - - 42

2. A sale in 1802, of lands in *Allahabad*, for arrears of Government revenue, set aside by the *Mofussil* and *Sudder* Commissioners, constituted under Reg. I. of 1821, although no suit brought to annul the sale until the year 1821. Affirmed on Appeal by the Judicial Committee.

But the sale having taken place by the direction of the Government, and there being no fraud on the part of the purchaser, the Judicial Committee, under clause 2, sec. 4, of Reg. I. of 1821, awarded the purchaser compensation, to be paid by the Government. [*Maha-rajah Ishuree Persad Narain Sing* v. *Lal Chutterput Sing*] - - - - 100

SHERIFF.

A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. Held that the officer was justified in so doing.

Held also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door.

Quære. If indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer. [*Aga Kurboolie Mahomed* v. *The Queen*] - - 164

STOPPAGE IN TRANSITU.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprized the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at *Bombay*), that trover would not lie for the goods, for that, on their delivery on board the vessel, they were no longer *in transitu*, so as to

be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. [*Cowas-jee* v. *Thompson*] - - - - - 422

SURETY.

See "PRINCIPAL AND SURETY."

UNDIVIDED HINDOO FAMILY.

See "COPARCENARY."

VENDOR AND VENDEE.

See "BOUGHT AND SOLD NOTES."
"STOPPAGE IN TRANSITU."

WIDOW.

See "ADOPTION."

WILL.

The 7th section of the Indian Will Act, No. 25, of 1838, enacts "that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the Testator or by some other person in his presence, and by his direction, and such signature shall be made, or acknowledged, by the Testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary."

A Testator signed his Will in the presence of a witness, who subscribed it in his presence; and some time afterwards, upon the arrival of another witness, the Testator, in the joint presence of the former witness, and the other subscribing witness, acknowledged his subscription at the foot of the Will. The second witness then subscribed the Will, and the first witness, in his and the Testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at *Calcutta*), that the requirements of the Act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the Testator, and jointly subscribe it in his presence. [*Casement* v. *Fulton*] - - - - 395